IN THE SUPREME COURT OF MISSOURI

ST. CHARLES COUNTY, et al.,	)	
	)	
Appellants,	)	
	)	
vs.	)	**Docket No. SC 86302**
	)	
CITY OF ST. PETERS, et al.,	)	
	)	
Respondents.	)	

Appeal from the Eleventh Judicial Circuit Court
Honorable Lucy D. Rauch, Circuit Judge
Division No. 3

SUBSTITUTE BRIEF OF RESPONDENT/CROSS-APPELLANT CITY OF ST. PETERS, MISSOURI

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JURISDICTIONAL STATEMENT

This case involves the claims by Appellants that Respondent, the City of St. Peters ("City" or "St. Peters") violated provisions of Missouri's Real Property Tax Increment Allocation Act, §§ 99.800 to 99.865, RSMo (the "Act"), in the City's 1992 adoption of its City Centre Redevelopment Plan and claims that the Act and the Plan violate the Missouri Constitution. The appeal was originally filed in this Court, but transferred to the Missouri Court of Appeals, Eastern District. In a per curium order, the Court of Appeals affirmed the Trial Court's summary judgment against Appellants on all claims and issued a written opinion to the parties. Respondents' Appendix (attached), page A20. Appellants sought transfer to this Court after the opinion. This Court sustained the transfer application. This Court's jurisdiction is founded on Mo. Const. art. V, § 10.

STATEMENT OF FACTS

Pursuant to Rule 84.04(f), the following Statement of Facts is provided.

Appellants, St. Charles County, the St. Charles County Executive Joe Ortwerth, and Joe Ortwerth (as an individual taxpayer) (hereinafter "Plaintiffs") appeal the Trial Court's entry of summary judgment against them on their Petition. Their Petition challenged various aspects of a TIF Redevelopment begun by St. Peters in 1992. L. 12.[1]

I. The St. Peters City Centre Redevelopment Plan and Ordinances

On December 29, 1992, the Board of Aldermen (the "Board") of St. Peters adopted Ordinances 1961 and 1962 (collectively the "Ordinances") relating to redevelopment of a certain blighted area within St. Peters under the auspices of the Act.[2] L. 509, 517.

In Ordinance 1961, the Board designated a Redevelopment Area (the "Area") pursuant to the Act, and adopted the Plan. A legal description of the Area and Plan are

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[1] References to the Appellants' Legal File will be to "L. ___"; to Appellants' Substitute Brief will be to "App. ___"; to Respondents' Legal File will be to "RL. ___"; and to Respondents' Appendix will be to "RA._____".

[2] All citations to the Act will be to the 1991 version codified in the Revised Statutes of Missouri 1986 as supplemented through 1991 without any date reference or reference to "RSMo." Where later or earlier versions of the Act are referenced, the year of the law will be referenced, for example, "RSMo (1986)".

contained in the Ordinance and Plan. L. 173-75; 236-39. The Area consists of approximately 581 acres located generally along and south of Interstate 70.

Approximately 460 acres of the Area was zoned as a "Special District" (the "Special District") in 1988. L. 190, 192. Through this "Special District" zoning, St. Peters sought to encourage private development in the Special District. In 1992, the Special District remained vacant. L. 193. The Special District was "nearly devoid of significant infrastructure, lacking roads, water lines, and storm and sanitary sewer lines." L. 193. Only three roads served this area and most of the area was not served by roads of any kind. L. 196.

In the western end of this Special District, in the area traversed by Spencer Creek, flooding occurred during periods of heavy rain. L. 202. Three times in the 1980's Interstate 70 closed due to flooding resulting from lack of infrastructure in the Spencer Creek area. L. 203. In this area, more than two-thirds of a mile of major storm-water channel improvements were required. L. 202.[3]

The Plan includes a detailed narrative of these facts and many others relating to blight within the Area. L. 195-202. The factors demonstrating blight were summarized by the parties in their Joint Stipulation of Facts filed with the Trial Court, included in the Legal File at pages 1236-1240. The facts are repeated by Appellants at pages 2-23 of their Brief. App. 2-23.

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[3] This same area later became the site of redevelopment under the Plan by Defendant Costco Wholesale Corporation ("Costco").

The Plan outlines a single, comprehensive "program which [St. Peters] proposes to be undertaken to accomplish the objectives for the [Area]." L. 204. The Plan identifies the objectives of redevelopment, including the elimination and reduction of conditions of blight in the Area; preventing recurrence and expansion of blight conditions; enhancing the tax base of taxing districts in the Area; and "[s]timulat[ing] rehabilitation, development, and redevelopment of the [Area] and environs through private investment." Id.

Among the Plan's proposed redevelopment activities are the financing of construction of the REC-PLEX, "a community recreation center facility." L. 191. The Plan anticipated the REC-PLEX will "generate significant 'spinoff' economic benefit particularly when the facility is host to major national and regional athletic events." L. 212. The Plan recites that St. Peters residents previously approved general obligation bonds in the amount of $16 million to finance the construction of the REC-PLEX community recreation center. Id. Under the Plan, TIF revenues would be applied to pay principal and interest on the general obligation bonds. Id.

In 1993, St. Charles County contributed $25,000 to assist in development of the REC-PLEX. RL. 231-34.

The Plan also outlines other activities, including assistance in the "build-out" of the neighboring Mid-Rivers Mall, located to the west of the Area. According to Mr. John Brancaglione, the planning consultant on the Plan and St. Peters' designated expert witness in this case, significant storm drainage issues affecting the Mall expansion were "a major factor" in including the expansion in the Area. L. 202-03. The lack of an

adequate drainage system was "causing all sorts of problems with respect to flooding both on properties and onto [Interstate] I-70 in storm situations." L. 410. As to the area traversed by Spencer Creek, the Plan identified a "power retail" to accomplish redevelopment of this area. L. 213.

The Plan also identified future activities to be supported in the Area, including major infrastructure improvements such as sanitary lines, storm water systems, roads and other related infrastructure. L. 191. The Plan, with other efforts of St. Peters, "are designed to act in concert to establish the [Area] as the commercial core—in fact the Downtown—of [St. Peters]." L. 551.

The Plan activities taken together constitute a single redevelopment project for the Area. As explained by Mr. Brancaglione, there is "a redevelopment area and a redevelopment project area that are contiguous, one in the same." L. 419. He testified that he has been involved in at least six TIF redevelopments where there is a single redevelopment project under the plan for the redevelopment area, including, redevelopment in Chesterfield Valley in St. Louis County, and in the Missouri cities of Ferguson, Normandy and St. Louis. Id.

In Ordinance 1962, the Board adopted tax increment financing for the Area, designating by legal description the area selected for the redevelopment project outlined in its Plan. L. 517-525. The legal description of the area selected for the redevelopment project is titled, "TIF District Description." L. 522. In Ordinance 1962, the Board made its legislative determination that the area selected for the redevelopment project includes "only those parcels of real property and improvements therein which will be substantially

benefited by the Projects." L. 518. Pursuant to the Act, all taxing districts, including the County, were notified of the public hearing at which the Plan was approved. L. 517.

II. The Plan's Operation

In 1991, the year prior to adoption of the Plan, the assessed value of real property within the Area was $3.8 million. A one percent (1%) sales tax levy generated revenues from within the Area in the amount of $49,570.64. L. 1244.

As of September 2001, the assessed value of the real property in the Area was $19.2 million, an increase of over $15.4 million from the 1991 valuation. Id. In 2001, a one percent (1%) levy generated $923,783.68 of sales tax revenue from within the Area. Id.

Construction on the REC-PLEX began quickly after the adoption of the TIF Redevelopment Plan.

Since the adoption of the Plan, St. Peters sought developers to participate in other redevelopment activities in the Area. Between 1993 and continuing through 1998, St. Peters engaged in negotiations with various developers to undertake redevelopment in the area traversed by Spencer Creek. Among the proposals considered were a multi-plex movie theatre and different iterations of retail centers. L. 1244-45.

In early 1999, St. Peters entered into negotiations with Costco Wholesale Corporation ("Costco"). On May 13, 1999, St. Peters and Costco entered into an agreement securing Costco's participation in the Plan as the developer of a "power retail" center in the Spencer Creek Area. L. 1245. Also on May 13, 1999, the Board adopted Ordinance 3339 approving the fifth amendment to the Plan, outlining the redevelopment

activity planned for the Spencer Creek Area as "an approximately 146,000 square foot retail facility for [Costco] . . . and approximately 110,000 square feet of additional high-end retail stores and restaurants." In Ordinance 3340, the Board authorized and approved the First Amended and Restated Redevelopment Agreement for the Costco development ("Costco Agreement"). Id.

Under the Costco Agreement, revenues in the special allocation fund attributable to PILOTS and EATS generated from the Costco Redevelopment are pledged to repay infrastructure costs first, with the excess, if any, as declared surplus to be distributed to taxing districts. L. 631, 1246. In April 2001, notes totaling $7,470,000 for reimbursement of infrastructure expenses were issued. The Notes were secured by the Plan's special allocation fund. In December, 2001, an additional $1,209,000 in Notes were issued. Through September 30, 2002, the Notes holder has been paid a total of $212,742 from the Plan's special allocation fund.

In 1995, J.C. Penney began construction of a 125,329 square-foot store in the Area. Other private developers completed a 28,000 square foot office building and an office building of approximately 25,000 square feet. L. 1248.

From inception of the Plan until August 30, 2002, the Plan's special allocation fund has received $1,012,510.09 in EATS resulting from increased sales tax levies on economic activities within the Area. From inception of the Plan until August 30, 2002, the Plan's special allocation fund has received $3,799,167.19 in PILOTS. L. 1249.

From inception to September 30, 2002, the special allocation fund has made payments totaling $6,881,160, of which $212,742 represented payments on the Costco

Notes, $4,308,615 represented payments toward financing of the REC-PLEX, $1,008,543 represented payments for street and other infrastructure improvements, and $1,288,345 represented payments of surplus funds to other taxing districts. L. 1248.

Through September 30, 2002, over $23 million in obligations have been issued supported by the special allocation fund. L. 1247-48.

III. Procedural History of the Plaintiffs' Lawsuit

On August 9, 2000, 8 years after the adoption of the Plan, St. Charles County filed a 12-count Petition against St. Peters challenging various aspects of the Plan and Ordinances. RL. 4.

On September 4, 2001, St. Charles County voluntarily dismissed that Petition. RL. 6. But on October 4, 2001, the Plaintiffs filed the Petition involved in this Appeal. L. 9. St. Peters requested the Trial Court assess the costs of defending the prior litigation, including St. Peters' attorneys' fees and expenses, against Plaintiffs. RL. 4.

The Attorney General requested leave to intervene on the claims in Counts VII and VIII of the Petition. L. 2. Those claims challenged the Costco development under Art. X, § 10(a), Mo. Const. (Count VII), and under Art. VI, §§ 23 and 25 (Count VIII). L. 29-34. The Trial Court granted the Attorney General leave to intervene on these claims. L. 4, 103. The Attorney General filed a motion for judgment on the pleadings as to these Counts.

On June 17, 2002, Plaintiffs filed a motion for partial summary judgment and memorandum in support on Counts I-IV of the Petition. L. 104 *et seq.* St. Peters timely filed its response to the motion and memorandum in opposition. RL. 178; L. 6.

On June 17, 2002, St. Peters, joined by Costco, filed a motion for summary judgment on all claims in the Petition. L. 320 *et seq*. Plaintiffs failed to file timely a response to the motion. RL. 178; L. 6.

On September 30, 2002, Plaintiffs filed their motion for summary judgment on Counts V-VIII. St. Peters timely filed its response. RL. 178; L. 6.

The Trial Court held an extensive hearing on the cross-motions on December 4, 2002. L. 7-8. On May 1, 2003, the Trial Court entered its Judgment and Order granting summary judgment against Plaintiffs on all Counts of the Petition. L. 8.

On May 30, 2003, St. Peters, joined by Costco, requested the Trial Court assess the costs of the suit, including their attorneys' fees and expenses, against Plaintiffs. RL. 244. A hearing was held on the motions for costs on June 19, 2003. RL. 2. The Trial Court in its Order dated June 30, 2003, denied the motion to assess as costs attorneys' fees and expenses. RL. 3.

Plaintiffs appealed. L. 8. St. Peters cross-appealed the Trial Court's denial of the motions to assess attorneys' fees and expenses as costs against Plaintiffs.

On July 27, 2004, the Missouri Court of Appeals, Eastern District, entered its *per curiam* Order affirming the judgment of the Trial Court in all respects. RA. A20. With that Order, the Eastern District Court of Appeals issued its Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16(b). RA. A20-A29.

POINTS RELIED ON

I. The Trial Court Properly Granted Summary Judgment In Favor Of St. Peters On Counts I through III Of The Petition Because St. Peters Properly Collects PILOTS From The Redevelopment Project Area And Uses PILOTS To Finance The City's Redevelopment Plan.

Allright Missouri, Inc. v. Civic Plaza Redevelopment Corp., 538 S.W.2d 320 (Mo. banc 1976)

Tax Increment Financing Com'n of Kansas City v. J.E. Dunn Const. Co., Inc., 781 S.W.2d 70 (Mo. banc 1989)

Spradlin v. City of Fulton, 924 S.W.2d 259 (Mo. banc 1996)

II. The Trial Court Properly Granted Summary Judgment On Counts I-III Of Plaintiffs' Petition Because St. Peters Complied With The Act In Designating The Entire Redevelopment Area As Its "Area Selected For The Redevelopment Project."

Allright Missouri, Inc. v. Civic Plaza Redevelopment Corp., 538 S.W.2d 320 (Mo. banc 1976)

Wolff Shoe Co. v. Director of Revenue, 762 S.W.2d 29 (Mo. banc 1988)

§ 99.805(10), RSMo (Supp. 1991)

§ 99.845, RSMo (Supp. 1991)

III. The Trial Court Properly Granted Summary Judgment In Favor Of St. Peters On Count IV Of The Petition Because St. Peters Properly Used PILOTS To Finance Construction of the REC-PLEX.

Hagan v. Director of Revenue, 968 S.W.2d 704, 706 (Mo. banc 1998)

Butler v. Mitchell-Hugeback, Inc., 895 S.W.2d 15, 19 (Mo. banc 1995)

IV. The Trial Court Properly Granted Summary Judgment In Favor Of St. Peters On Count V Of The Petition Which Claimed That St. Peters Acted In Bad Faith or Acted Arbitrarily Or In Excess Of Its Authority In Adoption Of The Plan And Ordinances Because The Board's Legislative Determination That The Area Contains A Predominance Of Factors Of Blight Is Supported By An Overwhelming Factual Record.

Allright Missouri, Inc. v. Civic Plaza Redevelopment Corp., 538 S.W.2d 320 (Mo. banc 1976)

JG St. Louis West Ltd. Liability Co. v. City of Des Peres, 41 S.W.3d 513, 517 (Mo. App. E.D. 2001)

Tierney v. Planned Indust. Expansion Auth. of Kansas City, 742 S.W.2d 146, 151 (Mo. banc 1987)

V. The Trial Court Properly Granted Summary Judgment In Favor Of St. Peters On Count VI Of The Petition Because Obligations Issued To Support The Costco Development Do Not Violate Art. VI, § 27(b), Mo. Const.

Article VI, § 27(b), Mo. Const.

Tax Increment Financing Com'n of Kansas City v. J.E. Dunn Const. Co., Inc., 781 S.W.2d 70 (Mo. banc 1989)

VI. The Trial Court Properly Granted Summary Judgment In Favor Of St. Peters On Count VIII Of The Petition Because The Use Of EATS Under The Plan And Ordinances Does Not Violate Art. VI, §§ 23 and 25.

Tax Increment Financing Com'n of Kansas City v. J.E. Dunn Const. Co., Inc., 781 S.W.2d 70 (Mo. banc 1989)

Berry v. State, 908 S.W.2d 682 (Mo. banc 1995)

Jefferson County v. Quiktrip Corp., 912 S.W.2d 487 (Mo. banc 1995)

VII. The Trial Court Properly Granted Summary Judgment In Favor Of St. Peters On Plaintiffs' Claims Because Plaintiffs Did Not File Suit Within The Applicable Statute Of Limitations, § 516.120.

Dixon v. Shafton, 649 S.W.2d 435 (Mo. banc 1983)

State ex rel. Robb v. Poelker, 515 S.W.2d 577 (Mo. banc 1974)

Rose v. City of Riverside, 827 S.W.2d 737 (Mo. App. W.D. 1992)

§ 516.120, RSMo (2000)

VIII. The Trial Court Properly Granted Summary Judgment In Favor Of St. Peters On All Claims Of The Petition Because Each Year's Demand By St. Peters

For PILOTS And EATS Does Not Constitute A Continuing Wrong Tolling The 5-Year Statute Of Limitations.

Janssen v. Guaranty Land Title Co., 571 S.W.2d 702 (Mo. App. 1978)

Lato v. Concord Homes, Inc., 659 S.W.2d 593 (Mo. App. E.D. 1983)

§ 516.120, RSMo (2000)

IX. The Trial Court Correctly Granted Summary Judgment On All Claims Of Plaintiffs' Petition Based On Untimeliness.

Green v. City of St. Louis, 870 S.W.2d 794 (Mo. banc 1994)

Dunklin County v. Chouteau, 25 S.W. 553 (Mo 1894)

Twelve Oaks Motor Inn, Inc. v. Strahan, 110 S.W.3d 404 (Mo.App. S.D. 2003)

X. Plaintiffs' Claims For Refunds Or Recovery Of The PILOTS And EATS Are In Any Event Barred Because Of the Doctrine Of Sovereign Immunity And The Absence Of A Statutory Procedure Authorizing Such Recovery.

Community Federal Savings & Loan Association v. Director of Revenue, 752 S.W.2d 794 (Mo. banc 1988)

Lett v. City of St. Louis, 948 S.W.2d 614 (Mo. App. E.D. 1996)

XI. The Trial Court Erred In Refusing To Assess The Attorneys' Fees Incurred By St. Peters And Costco In This Action Against The Plaintiffs In That The Declaratory Judgment Act Permits Attorneys' Fees To Be Recovered In Cases of

Special Circumstances, And The Trial Court Abused Its Discretion In Failing To Find Special Circumstances Exist In This Case.

Bernheimer v. First Nat. Bank of Kansas City, 225 S.W.2d 745 (Mo. banc 1950)

Temple Stephens Co. v. Westenhaver, 776 S.W.2d 438 (Mo. App. W.D. 1989)

Rule 87.09, MO.R.CIV.P.

ARGUMENT

INTRODUCTION

Plaintiffs appeal the Trial Court's Judgment against them on all claims of their Petition.[4]

Plaintiffs' Petition was originally filed in August 2000, more than 8 years after St. Peters adopted its Redevelopment Plan and adopted tax increment financing to support its comprehensive redevelopment project outlined in the Plan. Plaintiffs disagree with St. Peters' Board on the propriety of redevelopment in the Area and the means chosen by the Board to accomplish redevelopment. Plaintiffs challenge the Board's finding of blight within the Area, the designation of the Area, the Plan adopted by the Board, and the adoption of tax increment allocation financing for the Area.

All of the claims raised by Plaintiffs are time-barred because they were first raised ***8 years*** after the 1992 adoption of the Plan and Ordinances (POINTS VII, VIII and IX). Over $23 million in obligations have been issued supported by the special allocation fund. Undoing the Plan and Ordinances a decade after their adoption would have devastating financial consequences. All of Plaintiffs' claims, proper or not, should have been brought—and could have been brought—before millions of dollars of obligations have been issued by St. Peters in support of the redevelopment.

[4] Plaintiffs also attempt to appeal from the Trial Court's denial of their Motions for Summary Judgment. A denial of summary judgment, however, is not appealable. Transatlantic Ltd. V. Salva, 71 S.W.3d 670, 675-76 (Mo. App. W.D. 2002).

In addition, the Board's December 1992 conclusions regarding blight in the Area and the means chosen to remedy the blight are legislative determinations supported by a substantial record. Nothing presented to the Trial Court compels reversal of the Board's purely legislative decisions on these issues, especially in light of the applicable standard of review. Courts are properly and narrowly confined in the arena of legislative decision-making to determine whether legislative decisions are "fairly debatable," and if they are, then the legislative determination stands. As counsel for Plaintiffs once aptly observed, "[o]ut of proper respect for the role of co-equal branches of government, this Court has consistently refused to second-guess local government legislative factual determinations that a statutory condition is met unless there is a claim that the city's decision is the product of fraud, collusion, or bad faith or is arbitrary and without support in reason or law." Spradlin v. City of Fulton, 924 S.W.2d 259, 263 (Mo. banc 1996).

Plaintiffs have personal and political disagreements with the Board's 1992 legislative determinations. But Plaintiffs have presented no legally cognizable claims in their suit.

In POINTS I and II, Plaintiffs appeal the judgment against them on Counts I through III of their Petition, in which they claimed the City's Plan and Ordinances violate the Act because the real property in the Area allegedly does not substantially benefit from the REC-PLEX. Their argument fails because the REC-PLEX is only one of several activities under the Plan. And because, fundamentally, Plaintiffs challenge the 1992 legislative determination of the Board which determined the Plan's activities would substantially benefit all real property in the Area. Under the proper analysis—that the

Plan as a whole will substantially benefit real property in the Area—summary judgment is clearly appropriate.

In POINT III, Plaintiffs challenge the use of increment to finance the REC-PLEX, asserting that PILOTS are only to be used for a "private use" and the REC-PLEX is a public use. (POINT III). In this POINT, however, Plaintiffs concede that "private use" under the Act relates to the character of PILOTS as "special assessments," and, again, their argument again devolves into one of a dispute regarding the Board's legislative determination—whether the Plan's comprehensive program for the eradication of blight substantially benefits all of the real property in the Area.

Plaintiffs also challenge the Board's legislative determination of the existence of blight in the Area. (POINT IV). The overwhelming record supports the determination of blight, the designation of the Area, adoption of a Plan for redevelopment and adoption of tax increment allocation financing for redevelopment of the Area.

The remaining two points of Plaintiffs' Appeal raise legal questions that do not seriously challenge fundamental and settled notions regarding the constitutionality of the Act. This Court should sustain the Trial Court's conclusion that EATS provisions of the Act do not violate Art. VI, §§ 23 and 25, Mo. Const. (challenged in POINT VI), because the well-settled public purposes of the Act defeat Plaintiffs' argument that the Act permits public funds to be granted to private entities. The issues raised herein affect decades-old TIF redevelopments adopted in 49 municipalities in this State. As of early 2001, 125 plans have been adopted under the Act in Missouri municipalities. L. 1244.

This Court should also sustain the Trial Court's conclusion that obligations issued

under the Act do not implicate Art. VI, § 27(b), and are properly issued on the Board's authority. (POINT V)

As more fully discussed herein, the Trial Court's Judgment against Plaintiffs on all claims should be affirmed.

St. Peters also appeals the decision of the Trial Court refusing to award attorneys' fees to St. Peters that were incurred in defense of Plaintiffs' claims. (CROSS-APPEAL POINT XI).

Standard of Review

For all points on the Appeal by Plaintiffs, the applicable standard of review for this Court is *de novo*.[5]

Review of summary judgment is *de novo*. "The propriety of summary judgment is purely an issue of law. As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp, 854 S.W.2d 371, 376 (Mo. banc 1993). "Summary judgment will be upheld on appeal if: (1) there is no genuine dispute of material fact and (2) the movant is entitled to judgment as a matter of law." Nusbaum v. City of Kansas City, 100 S.W.3d 101, 105 (Mo. banc 2003) (citing ITT Commercial Finance, 854 S.W.2d at 377).

Because this Court's review is *de novo*, "the trial court's order may be affirmed in this Court on an entirely different basis than that posited at trial." ITT Commercial Finance, 854 S.W.2d at 388.

[5] St. Peters' Cross-Appeal POINT, POINT XI, is governed by a different standard of review set out within POINT XI.

I.

I. The Trial Court Properly Granted Summary Judgment In Favor Of St. Peters On Counts I through III Of The Petition Because St. Peters Properly Collects PILOTS From The Redevelopment Project Area And Uses PILOTS To Finance The City's Redevelopment Plan.

A. Introduction

In POINT I, Plaintiffs assert the Trial Court erred in granting summary judgment on Counts I through III of their Petition because PILOTS are "special assessments" and (a) the use of PILOTS under the Plan provides no substantial benefit to real property in the Area, and (b) the use of PILOTS to finance the REC-PLEX is not permitted under the Act. (App. 50).

In Count I of their Petition, Plaintiffs alleged that St. Peters violated § 99.805(10) because it did not adopt "an ordinance specifically approving a redevelopment project for the REC-PLEX or the Mid-Rivers Mall expansion setting out the legal description of the area selected for the redevelopment project." L. 16. In their motion for summary judgment, Plaintiffs asserted that "redevelopment projects," as defined in § 99.805(10), "are specific improvements within a redevelopment area and must be clearly identified by a legal description." L. 115.

As the Trial Court properly concluded, the REC-PLEX and Mid-Rivers Mall expansion, among others, are elements of St. Peters' single Redevelopment Project, viz., its Plan. L. 1692 (Judgment, p. 13). Further, the requirement contained in

§ 99.805(10) of setting forth "a legal description of the area selected for the redevelopment project" relates to the adoption of tax increment financing contained in § 99.845. St. Peters adopted tax increment financing for its Redevelopment Project in Ordinance 1962 by setting forth the legal description of the Area. Thus, through Ordinance 1962, St. Peters "set forth the legal description of the area selected for the redevelopment project." L. 1692 (Judgment, p. 13). That legal description was titled "TIF District Description."

In Count II, Plaintiffs claim St. Peters violated "§ 99.945.3 by collecting EATS from the entire redevelopment area" because § 99.845.3 "permits a city to collect EATS only 'within the area of the redevelopment project.'" L. 18. In Count III, Plaintiffs claim St. Peters violated "§ 99.945 by collecting PILOTS from the entire redevelopment area" because § 99.845 "permits a city to collect PILOTS only from 'the area of the redevelopment project.'" L. 19.

The Trial Court properly concluded that Ordinance 1962 includes "a legal description of the area for which tax increment financing was adopted (Ordinance 1962)." L. 1692 (Judgment, p. 13). The area selected for St. Peters' redevelopment project is co-extensive with the Area and its Redevelopment Project is the Plan.

The plain language of the Act and the history of the Act support the Trial Court's judgment against Plaintiffs on Counts I through III.

B. Plaintiffs' Argument That St. Peters' Adoption Of Tax Increment Financing Violated § 99.820.1(1) Was Not Pled In Counts I-III And Was Not Otherwise Raised Before The Trial Court And Should Be Rejected As A Basis For Reversing The Trial Court's Summary Judgment On Counts I-III.

Plaintiffs contend on this Appeal under POINT I that St. Peters violates the Act by collecting PILOTS from the Area because "there has been no direct and substantial benefit to the property against which the PILOTS are levied" or (2) the "construction of a public facility like the REC-PLEX cannot be accomplished with special assessments/PILOTS." App. 50.

The first argument—based on an asserted violation of § 99.820.1(1) which contains the requirement of "substantial benefit"—is nowhere contained in Counts I through III of the Petition. L. 9-34. Counts I through III contain no citation to § 99.820.1(1) and raise no claim of violation of § 99.820.1(1).

To the extent POINT I rests on a claimed violation of the Act nowhere presented in Counts I through III of the Petition or in the motion for summary judgment presented by Plaintiffs, their appeal here on those grounds must be rejected.

C. The Area Selected For The Redevelopment Project Includes Only Those Parcels Of Real Property Substantially Benefited By The Proposed Redevelopment Project Improvements.

The burden of proving the Ordinances are invalid rests with Plaintiffs. Allright Missouri, Inc. v. Civic Plaza Redevelopment Corp., 538 S.W.2d 320, 324 (Mo. banc 1976). "Ordinances are presumed to be valid and lawful." McCollum v. Director of

Revenue, 906 S.W.2d 368, 369 (Mo. banc 1995). An ordinance must be construed to uphold its validity unless it is "expressly inconsistent or in irreconcilable conflict" with the statute. Id. at 369.

The record clearly supports the Board's legislative determination in 1992 that the area selected for the redevelopment project—the Area—includes "only those parcels of real property and improvements thereon substantially benefited by the proposed redevelopment project improvements." See § 99.820.1(1).

In Tax Increment Financing Com'n of Kansas City v. J.E. Dunn Const. Co., Inc., this Court held that "PILOTS are special assessments levied against the property in the District for the ***improvements provided that property under a redevelopment plan***." 781 S.W.2d 70, 77 (Mo. banc 1989) (emphasis supplied). In the context of PILOTS, as the Supreme Court in Dunn explicitly recognized, the "special benefits" conferred are the "improvements provided that property ***under a redevelopment plan***." Id. (emphasis added). At the time Dunn was before this Court, PILOTS were the only available increment (Dunn was decided before EATS were adopted), and PILOTS were collected from within the "Redevelopment Project Area"—the area of "blight."

"Special assessments" are valid only when imposed to pay for improvements clearly conferring special benefits on the property assessed. City of Webster Groves v. Taylor, 13 S.W.2d 646, 647 (Mo. 1929). Missouri courts review the legislative determination of whether a "special benefit" is conferred under the "***fairly debatable***" standard. Schweig v. City of St. Louis, 569 S.W.2d 215, 224 (Mo. App. E.D. 1978). In addressing a challenge to "special assessments," "a legislative determination that benefits

are conferred ***is conclusive*** on both the owner and the courts, unless it is made to appear that the legislative action is fraudulent, or arbitrary and wholly unwarranted, and by reason of its arbitrary character, is mere confiscation of particular property." Zahner v. City of Perryville, 813 S.W.2d 855, 859 (Mo. banc 1991) (emphasis added). "Out of proper respect for the role of co-equal branches of government, this Court has consistently refused to second-guess local government legislative factual determinations that a statutory condition is met unless there is a claim that the city's decision is the product of fraud, collusion, or bad faith or is arbitrary and without support in reason or law." Spradlin v. City of Fulton, 924 S.W.2d 259, 263 (Mo. banc 1996); Sears v. City of Columbia, 660 S.W.2d 238, 246 (Mo. App. W.D. 1983) ("There is no way to reverse a legislative function if the reasonableness of the City's action is fairly debatable."). Further, as recognized by this Court a century ago, "the amount of benefit which an improvement will confer upon particular land, indeed whether it is a benefit at all, is ***a matter of forecast and estimate***." Heman Const. Co. v. Wabash R. Co., 104 S.W. 67, 71 (Mo. 1907) (emphasis supplied).

In the context of the Act, the "special assessments" analysis requires an examination of whether the "redevelopment project improvements" provide the benefit identified. In this case, the Redevelopment Project consists of all of the elements of the Plan. Thus, the analysis of "substantial benefit" relates to whether the Plan substantially benefits the real property in the Area. See § 99.820.1(1).

The record conclusively demonstrates that there is no genuine dispute of material fact regarding whether the Board properly included in the Area only real property that substantially benefits from the improvements contemplated by the Plan.

In Ordinance No. 1962, St. Peters' Board of Aldermen specifically addressed the issue of substantial benefit and concluded that the Area "only includes those parcels of real property and improvements therein which will be substantially benefited by the Projects." L. 177.

The Plan includes ample evidence supporting that determination. The Plan states it is intended "to achieve eradication of the blighting factors in existence and cause the development and/or redevelopment of the area through the provision of funds for the following activities: Property assembly costs . . . site infrastructure improvements directed at inducing a project for the redevelopment of an area at the southeast quadrant of Suemandy Road and South Outer Road for a major retail redevelopment of the type commonly referred to by developers as a "power" retail center . . . the development of a community recreation center facility [REC-PLEX] . . . The construction of needed roadway, water line, and storm and sanitary sewers infrastructure in the Special District portion of the Redevelopment Area to correct inadequate street layout and utilities and alleviate storm water flooding; and inducement of other redevelopment projects (as market conditions and opportunities arise) through funding costs associated with land acquisition, relocation, and/or public improvements for such projects." L. 1240-41.

The Plan acknowledges that the "inadequacy of the road system serving the Redevelopment Area and particularly the Special District section has severely retarded

the growth and development of the area." L. 1242. And, the Plan recognizes that "property owners and prospective developers have been unable to achieve economic feasibility for the projects once the cost of building the roads and related infrastructure is added to the other development costs involved in bringing a project to fruition." Id. The Plan's program for development of the Area addresses these issues, providing the "substantial benefit" identified in the Act.

The Plan anticipates the REC-PLEX "will generate significant 'spin-off' economic benefit particularly when the facility is host to major national and regional athletic events." L. 555. The Plan, with other initiatives by St. Peters, "are designed to act in concert to establish the Redevelopment Area as the commercial core—in fact the Downtown—of the City of St. Peters." L. 551. All of the property in the Area is anticipated to benefit from "the scale of new development in the Area . . . large enough to have meaningful positive impact." Id. All property in the Area will benefit from "coordinated stormwater handling systems." L. 552. The Plan anticipates that "the provision of badly needed infrastructure in the area via this Redevelopment Plan and its financing capabilities will induce the development to occur." L. 557.

The Plan is intended to "induce other projects and will offer potential for accelerated growth and development of the Redevelopment Area." L. 573-74.

As the Stipulation of Facts submitted to the Trial Court confirms, the results of the work in the Area so far overwhelmingly support the conclusion that the real property in the area has "substantially benefited" from the Plan. In the year 1991, a 1% levy generated sales taxes of $49,570.64 from within the Area; ***that same one-percent (1%)***

levy in the year 2001 generated $923,783.68 in revenue—an increase of almost twenty times. From inception of the Plan until August 30, 2002, the special allocation fund has received $1,012,510.09 in EATS resulting from County sales tax levies on economic activities within the Area. This means that increased economic activities in the Area have generated, through August 2002, over $2 million in new County sales tax revenues. L. 1244, 1249.

As of September 2001, the assessed value of the real property in the Area was $19.2 million, an increase of over $15.4 million from the 1991 assessed value of $3.8 million. L. 1249. The assessed value of real property in the Area has more than quadrupled.

Under the Plan, over $1 million in street improvements have been completed within the Area. L. 1249. Notes were issued secured by the special allocation fund totaling over $8.6 million for costs incurred in redevelopment in the area traversed by Spencer Creek including, but not limited to, property assemblage costs, utility relocation and extensions, construction and reconstruction of roads, traffic control, signalization and improvements to existing public roadways and acquisition of flood protection system right-of-way and flood protection system construction. L. 1246.

D. The County Assessor's Affidavit Does Not Create a Dispute of Material Fact Precluding Judgment In St. Peters Favor.

Plaintiffs contend summary judgment against them on Counts I – III was improper because the "undisputed St. Charles County Assessor's affidavit . . . showed that as a matter of fact the construction of the REC-PLEX did not create a direct economic or special benefit to property" within the Area. App. 50; SA A-1-A-2 (the "Affidavit").

1. <u>The Proper Question Is Whether The Board's Finding That The Plan Would Substantially Benefit Real Property In The Area Was Fairly Debatable At The Time It Was Made</u>.

The REC-PLEX, as confirmed by the entire record, is not the only "redevelopment project improvement" against which the "substantial benefit" to the real property in the Area is examined. As <u>Dunn</u> held and the Act confirms, the issue is the substantial benefit to the real property within the area of the project (in this case, the Area) provided by the project (in this case, the Plan). Therefore, the argument that the REC-PLEX did not create a direct economic or special benefit to the property—even if true—does not undermine the Board's 1992 legislative finding that the Redevelopment Plan provides substantial benefit to the property in the Area.

The Affidavit is no evidence that, ***at the time of adoption of the Plan***, the Board's determination that the REC-PLEX and other improvements would provide economic benefit is other than "fairly debatable." The scope of judicial review is limited to what was before the Board at the time of the decision to adopt the Plan and Ordinances. Section 99.820.1(1) specifically states it is the "***proposed*** redevelopment project

improvements" against which the "substantial benefit" is measured by the Board. (emphasis supplied)

Stated another way, even if there were a complete absence of "substantial benefit" measured by assessed values of the real property in the Area ***a decade after*** adoption of the Plan and Ordinances—***which is manifestly not the case***—adoption of this "hindsight" review advocated by Plaintiffs is not consistent with the "fairly debatable" standard. Facts existing ***years after*** are clearly not relevant to reviewing whether the legislative determination when made was "fairly debatable." Permitting such "hindsight" review of legislative determinations places an impossible burden on the legislative body to precisely "forecast and estimate" the outcome of the proposed Plan. See Heman Const. Co. v. Wabash R. Co., 104 S.W. 67, 71 (Mo. 1907). Redevelopment plans and Projects could be found illegal when, in fact, they only suffer from having failed to accomplish their intended goals.

2. The Affidavit Is Not Competent Evidence.

The Affidavit fails to comply with Rule 74.04(e) which requires an affidavit "shall set forth such facts as would be admissible in evidence." Mo.R.Civ.P. 74.04(e). "Conclusory allegations are not sufficient to raise a question of fact in summary judgment proceedings." Missouri Ins. Guar. Association v. Wal-Mart, 811 S.W.2d 28, 34 (Mo. App. E.D. 1991); Cardinal Glennon Children's Hospital v. St. Louis Labor Health Institute, 891 S.W.2d 560, 561 (Mo. App. E.D. 1995) (summary judgment affidavit containing conclusions, not admissible facts, preserves no genuine dispute). Plaintiffs designated no expert witnesses in this case. L. 426, 427. The Affidavit contains only

conclusions and opinions. For example, the assessor opines about "comparable areas of St. Charles County" and "typical increases" for such comparable areas." Accordingly, the affidavit provides no evidence countering the undisputed facts.

3. Even If Competent Evidence, The Affidavit Is Actually Evidence That Substantial Benefit Resulted To The Real Property In The Area.

As the Area was blighted before adoption of the Plan, the Assessor's opinion that the real property in the Area increased in value at a rate "typical" for "comparable areas" in the County, shows the remediation of the blight. That is, increasing the land values in the formerly blighted Area at the same rate as comparable areas of the County show the Plan is a success—that the Project substantially benefits the real property in the Area.

The Assessor's affidavit also concedes that some real property has increased in value above "typical" increases: "Except where there have been improvements made to a particular parcel or tract of real estate in the [Area] . . . ." L. 1437 The existence of tracts on which improvements have been made undercuts the conclusion drawn. Improvements to tracts of real property are precisely the type of activity spurred by the Plan. It is unreasonable to think that every square foot of the Area will be developed at a uniform rate. Indeed, improvements to any parcel within the blighted area benefits all real property.

And, as the stipulated facts show, over $9 million in improvements have been made to property within the Area. L. 1246. The assessed value of property in the Area has quadrupled. L. 1244. As Plaintiffs' will concede, none of the $3,799,167.19 in PILOTS received by the special allocation fund since the Plan's inception are derived

from the REC-PLEX real estate—those PILOTS result from the increases to the assessed valuation of property in the Area other than the REC-PLEX.

The undisputed material facts show that the Area redeveloped under St. Peters' Plan and Ordinances included only those parcels of real property and improvements thereon substantially benefited by the proposed redevelopment project improvements.

E. Financing Of The REC-PLEX Is A Permissible Redevelopment Project Cost Under The Act.

Plaintiffs second argument is that "construction of a public facility like the REC-PLEX cannot be accomplished with special assessments/PILOTS." They contend the use of PILOTS for the REC-PLEX is "contrary to the law." App. 50.

As explained above, the PILOTS generated and collected under the Plan are intended to fund and have funded the activities of the Plan—St. Peters' Project. To the extent Plaintiffs' argument rests on the assumption that the ***only*** use of PILOTS in the Area has been for the REC-PLEX, the argument fails.

To the extent Plaintiffs' argument questions the legality of using ***any*** TIF increment for financing of the REC-PLEX, that argument also fails. The Act clearly permits such use.

First, the Act specifically provides for the repayment of obligations previously issued—such as St. Peters' general obligation bonds. Section 99.840.2 provides that "[i]n the event a municipality issues obligations under home rule powers or other legislative authority, the proceeds of which are pledged to pay for redevelopment project costs, the municipality may . . . retire such obligations from funds in the special allocation fund." §

99.840.2. Thus, the use of PILOTS to repay St. Peters' general obligation bonds is specifically authorized by the Act.

Second, Sections 99.805(11)(f) and 99.820.1(9) both specifically permit the use of increment for public improvements, public works and public facilities.

Section 99.805(11), defining "redevelopment project costs," is intentionally broad. Within the scope of permissible redevelopment project costs are "all reasonable or necessary costs incurred or estimated to be incurred, and any such costs incidental to a redevelopment plan or redevelopment project…." § 99.805(11). As recognized by the court in JG St. Louis West Ltd. Liability Co. v. City of Des Peres, the definition of Redevelopment Project costs in the Act "specifically states that the examples [of permissible redevelopment project costs] are non-exclusive. They are meant to illustrate what type of costs may be defined as reasonable or necessary. The non-exclusive list in 99.805(11) broadens and does not narrow or limit the type of expenses that can be defined as redevelopment project costs." 41 S.W.3d 513, 522-23 (Mo. App. E.D. 2001).

The Act specifically provides that reimbursable redevelopment project costs include "public works" and "public improvements." § 99.805(11). "Public works" is defined as "fixed works (as schools, highways, docks) constructed for public use or enjoyment esp. when financed and owned by the government," "government sponsored public improvements (as parks or playgrounds) as distinguished from the work of a routine nature such as the grading and lighting of streets." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976), "*public works,*" 1836. As a "public work," the

REC-PLEX is a specifically identified reimbursable Redevelopment Project Cost under the Act.

The Act also specifically permits the construction of "public facilities." Section 99.820 provides a municipality may "[a]cquire and construct public facilities within a redevelopment area." § 99.820.1(9). The community recreation center (REC-PLEX) is clearly a "public facility." A municipality inherently possesses the authority to construct a public facility; if such a facility cannot be supported through the Act's financing mechanism, one wonders why "public facility" is mentioned at all. See City of Willow Springs v. Missouri State Librarian, 596 S.W.2d at 444 (the legislative is presumed not to have intended a meaningless act).

Indeed, Article VI, § 21 of the Missouri Constitution specifically provides for the construction of facilities such as the REC-PLEX in aid of redevelopment of blight: "Laws may be enacted … providing for the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas, and for recreational and other facilities incidental or appurtenant thereto…." Art. VI, § 21, mo. const.

The absurdity of Plaintiffs' interpretation is most stark when one considers "economic development areas." Prior to the adoption of EATS in 1990, the Act provided that PILOTS may be applied to support redevelopment of "economic development areas." § 99.805(3), RSMo (1986) (defining "economic development area"). Section 99.820.2 provided, however, that "tax increment financing projects within an economic development area shall apply to and fund only the following infrastructure projects:

highways, roads, streets, bridges, sewers, traffic control systems and devices, water distribution and supply systems, curbing, sidewalks ***and any other similar public improvements."*** § 99.820.2, RSMo (1986) (emphasis supplied). Plaintiffs' interpretation of "private use" results in the absurdity that tax increment financing was unavailable for economic development areas—specifically provided for in the Act—for the 8-year period from the 1982 adoption of the Act until the 1990 amendments adding EATS.

Plaintiffs contend that because the REC-PLEX benefits a larger area than just the Area or that because the REC-PLEX is a "public building," the use of increment to finance its construction is an illegal use of increment. App. 51.

The REC-PLEX clearly benefits a geographic area broader than the Area. Its broader impact is not relevant, however, to whether St. Peters' Project substantially benefits real property in the Area. The REC-PLEX is a "community recreation center facility." L. 534. Nothing in the Act precludes redevelopment which provides benefit to an entire region as well as to a blighted area. Indeed, the broader impact to the region also provides specific benefit to the Area. The Plan contemplates the REC-PLEX "will generate significant 'spinoff' economic benefit particularly when the facility is host to major national and regional athletic events." L. 555. Increased sales tax revenues and property values—reflected in the PILOTS and EATS paid to the special allocation fund—show this "significant 'spin-off' economic benefit" has occurred.

Plaintiffs cite to Heavens v. King County Rural Library Dist., 404 P.2d 453, 458 (Wash. banc 1965) as holding that "[recreation centers] are not constructed primarily to enhance the value of the real estate surrounding them," (App. 50), when clearly Heavens

did not so hold. Heavens, in the text cited, addressed a ***library***, stating "but libraries are not constructed primarily to enhance the value of the real estate surrounding them."[6] In Heavens, the Washington Court specifically recognized the long and settled authority that a public park sufficiently benefits neighboring property so as to sustain a special assessment for its support. Id.

Missouri's General Assembly, however, has taken a different tack than Washington's legislature. Missouri specifically permits public works, public improvements and public facilities to be constructed to aid in redevelopment of blighted areas. There is no *per se* rule in Missouri that a park or library cannot be supported though a special assessment. Had the legislature wanted to prevent the use of TIF for recreational facilities, it could have said so, as it did in the case of "gambling establishment[s]." § 99.810.1(6), RSMo (2000).

Lipscomb v. Lenon, also cited by Plaintiffs (App. 51), is no greater help. In Lipscomb, the Arkansas Court addressed a special assessment for construction of an auditorium of such a size that ***its only purpose*** could be to "provide an assembly room or community meeting house where, as occasions may require, large masses of the

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[6] In dissent, Judge Finley of the Washington Court would have upheld the assessment for a library because he reasoned "a modern library as akin to a park . . . [t]he architecture, landscaping and parklike setting of modern library facilities compel the conclusion that the surrounding property is benefited by the improvement." Heavens, 404 P.2d at 459 (Finley, J., dissenting).

inhabitants of the city and possibly inhabitants of territory not embraced in the district, but contiguous thereto, may congregate." 276 S.W. 367, 369 (Ark. 1925). The Arkansas Court also distinguished parks from the auditorium addressed: A park "adds decidedly to the attractiveness of, and hence, enhances the value of the real property immediately contiguous thereto…" Id.

In this case, the REC-PLEX is a recreation complex including swimming pools, a gymnasium, tennis and basketball courts, a hockey arena and other park amenities. L. 554-55. The REC-PLEX in many ways is closely analogous to a park. The Plan contemplates the complex will provide specific economic benefit to the commercial property in the Area through attraction of events. The REC-PLEX, admittedly, benefits the greater region, but it also provides specific benefit to all real property in the Area.

More importantly, as discussed above, the benefit provided through the application of PILOTS is the whole program of activities under the Plan and the REC-PLEX is only one component of the broader redevelopment contemplated.

In this case, the record overwhelmingly supports the conclusion that the use of PILOTS to finance the REC-PLEX is specifically permitted under the Act.

F. Conclusion

This Court should affirm the Trial Court's grant of summary judgment against Plaintiffs because St. Peters is entitled to judgment as a matter of law on the record of undisputed material facts presented on Counts I through III of Plaintiffs' Petition. POINT I of Plaintiffs' appeal herein must be denied.

II.

II. The Trial Court Properly Granted Summary Judgment On Counts I-III Of Plaintiffs' Petition Because St. Peters Complied With The Act In Designating The Entire Redevelopment Area As Its "Area Selected For The Redevelopment Project."

In POINT II, Plaintiffs contend St. Peters failed to use the proper words in its Plan and Ordinances. Plaintiffs contend St. Peters violated the Act because it failed to use the words "Redevelopment Project" in connection with its legal description of the area selected for its Redevelopment Project. App. 53. St. Peters used the words "TIF District Description." L. 522.

A. The Plan And Ordinances Comply With The Language Of The Act.

The burden of proving the Ordinances are invalid rests with Plaintiffs. Allright Missouri, Inc., 538 S.W.2d at 324. "Ordinances are presumed to be valid and lawful." McCollum, 906 S.W.2d at 369. An ordinance must be construed to uphold its validity unless it is "expressly inconsistent or in irreconcilable conflict" with the statute. Id.

As to the Act, "[t]he primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning." Wolff Shoe Co. v. Director of Revenue, 762 S.W.2d 29, 31 (Mo. banc 1988).

Section 99.805(10) defines "Redevelopment Project" as "any development project within a redevelopment area in furtherance of the objectives of the redevelopment plan; any such redevelopment project shall include a legal description of the area selected for the redevelopment project."

In both Ordinances 1961 and 1962, St. Peters set forth the required legal description. Ordinance 1961 sets forth the legal description of the Plan area—St. Peters' Redevelopment Project area. Through Ordinance 1962, St. Peters complied with the requirement of § 99.805(10) that the legal description be set forth by stating in the Ordinance the legal description of the area selected for its Redevelopment Project—the area of the Plan and Area.

The definition contained in § 99.805(10), as Plaintiffs' will concede, nowhere states ***how or where*** the municipality must "set forth the legal description of the area selected for the redevelopment project." Indeed, the definition does not require the municipality to use the words "redevelopment project" at all.

The Act provides that tax increment financing may be adopted only for "the area selected for a redevelopment project." § 99.845. St. Peters' Ordinance 1962 adopts tax increment allocation financing and sets forth the legal description of the area selected for such tax increment allocation financing. *Ipso facto,* the area described by St. Peters in that Ordinance—the Area—is the area of its "redevelopment project."

The Trial Court correctly concluded that the "Plan constitutes St. Peters' § 99.805(10) 'Redevelopment Project,' and therefore, setting forth the legal description of the Plan and Project area complies with the Act." L. 1692. St. Peters complied with the language of the Act in setting forth the legal description of the "area selected for the redevelopment project" by setting forth the legal description of the area selected for its Redevelopment Project in Ordinances 1961 and 1962.

The success of Plaintiffs' argument demands that the Court engraft requirements onto the Act that simply do not exist. Namely, Plaintiffs urge this Court to read into the Act a requirement that the words "redevelopment project" be used in the title of the "legal description of the area selected for the redevelopment project" (App. 61) or that the legal description of the area selected for the redevelopment project must be set forth somewhere other than in the ordinance adopting tax increment financing or the Plan. The Act plainly does not contain these requirements nor support their addition.

B. The Clear Intent Of the Act, As Shown By The Act's History, Permits A Municipality To Select The Area Of The Redevelopment Project By Adopting Tax Increment Financing For Its Selected Area.

The history of the Act supports St. Peters' Ordinances and Plan in this case.

The requirement of a "legal description"—upon which Plaintiffs' claims here are based—was added to the definition of "Redevelopment Project" in 1991 amendments to the Act. That language was part of amendments to the Act permitting, ***but not requiring***, a municipality to adopt tax increment financing at different times for several discrete redevelopment projects within a redevelopment area. St. Peters' Ordinances and Plan comply with the purpose for requiring a "legal description."

1. <u>The Act Prior To The 1991 Amendments</u>.

Before the 1991 amendments, tax increment was collected only from the ***entire*** Redevelopment Area—only one legal description setting forth the Redevelopment Area boundaries was necessary. After the 1991 amendments, the increment ***could be***—but was

not required to be—adopted for separate projects within a redevelopment area and could be adopted at different times.

Prior to the 1991 amendments, a "Redevelopment Project" was defined as "any development project in furtherance of the objectives of the redevelopment plan." § 99.805(9), RSMo (1986) (RA A3).[7] As originally enacted, the only increment under the Act was PILOTS. § 99.845, RSMo (1986). Prior to 1991, the definition of PILOTS was "those estimated revenues from real property in a ***redevelopment project area*** acquired by a municipality …." § 99.805(7), RSMo (1986) (emphasis added). "Redevelopment project area" was defined in the pre-1991 Act as the area of blight. § 99.805(10), RSMo. (1986). Thus, prior to the 1991 amendments, tax increment was collected from what is currently known as the "Redevelopment Area," that is, the entire area of blight.

Prior to the 1991 amendments, § 99.835.1 provided that "[o]bligations secured by the special allocation fund . . . for the ***redevelopment project area*** may be issued.…to provide for redevelopment project costs." § 99.835.1, RSMo (1986) (emphasis added). Those obligations were required to be retired "not more than twenty-three years from the ***adoption of the ordinance approving the redevelopment project area.…***" § 99.810(3), RSMo (1986) (emphasis added).

[7] The TIF Act as it read in 1986 (prior to the 1991 amendments) is attached in the Respondents Appendix (RA A1-A8); the Act as revised after the 1991 amendments is also attached. RA A10-A18.

2. <u>The 1991 Amendments To The Act</u>.

In the 1991 amendments to the Act, the General Assembly permitted municipalities to issue obligations to support individual redevelopment projects as well as redevelopment within the entire redevelopment area.

Section 99.835.1 was amended in 1991 to add "redevelopment project" but also retained the reference to "redevelopment area": "[o]bligations secured by the special allocation fund . . . for the ***redevelopment area or redevelopment project*** may be issued by the municipality." § 99.835.1 (emphasis supplied). The Act was revised to permit obligations to be retired within 23 years after the date of adoption of the ordinance adopting ***a redevelopment project***—not 23 years from the date of the declaration of blight.

Prior to the 1991 amendments, § 99.810(3) provided:

> No redevelopment plan shall be adopted by a municipality without findings that ...
>
> (3) The estimated dates, which shall not be more than twenty-three years from the ***adoption of the ordinance approving the redevelopment project area***, of completion of the redevelopment project and retirement of obligations incurred to finance redevelopment project costs have been stated.

§ 99.810(3), RSMo (1986) (emphasis supplied).

After the 1991 amendments, the amended § 99.810(3) provides:

> No redevelopment plan shall be adopted by a municipality without findings that …
>
> (3) The estimated dates, which shall not be more than twenty-three years from ***the adoption of the ordinance approving a redevelopment project within a***

redevelopment area, of completion of any redevelopment project and retirement of obligations incurred to finance redevelopment project costs has been stated . . . . § 99.810(3) (emphasis added).

3. <u>Separate Capture Clocks On Each Project.</u>

Through the 1991 amendment to § 99.810(3), the General Assembly extended the 23-year period within which the municipality was required to retire obligations and complete projects. After amendment, the date from which the 23-year "clock" ran could start at the time of the adoption of a specific "redevelopment project," instead of only from the date of the finding of blight in the designation of the "redevelopment project area." Prior to the 1991 amendments, every year of delay in beginning redevelopment work after the date the "blighted" area was designated had the effect of shortening the available time to retire obligations supporting redevelopment and shortening the time to complete redevelopment projects. Thus, if a redevelopment project began in the 10th year after the designation of "blight," the permissible term of the obligations issued to pay for that work was limited to 13 years (10 years + 13 years = 23 years).[8]

The 1991 amendments permitted, ***but did not require***, a municipality to independently designate specific, separate "redevelopment projects" within a "redevelopment area" and issue long-term obligations in support of individual redevelopment projects. Redevelopment costs attributable to each such separate

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[8] <u>See</u> Julie A. Goshorn, *In a TIF: Why Missouri Needs Tax Increment Financing Reform*, 77 WASH. U.L.Q. 919, 930, n. 57 (1999).

redevelopment project could be financed by PILOTS and EATS collected in that project's area for the full 23 years.[9] The amended definition of Redevelopment Project, incorporating the requirement of a legal description, implements this ***alternative*** project-specific type of TIF Redevelopment.

4. <u>Definitions In The Act Changed For The 1991 Amendments Permitting Separate Clocks</u>.

In addition to changing the definition of "Redevelopment Project," the General Assembly changed other definitions in the Act.

The "blighted area" was no longer called the "redevelopment ***project*** area," but the "redevelopment area." <u>Cf.</u> § 99.805(10), RSMo (1986) <u>to</u> § 99.805(9).

In the definition of PILOTS, the language changed from "those estimated revenues from real property in a ***redevelopment project area***" to "those estimated revenues from real property in the ***area selected for a redevelopment project.***" <u>Cf.</u> § 99.805(7), RSMo (1986) <u>to</u> § 99.805(7). Nothing in the Act prior to the 1991 amendments and nothing in the 1991 amendments required the area of "blight" and the area of a Redevelopment Project to be different areas.

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[9] The General Assembly also placed a limit, however, of "ten years from the adoption of the ordinance approving the redevelopment plan" in which the municipality could separately designate a new redevelopment project and take advantage of the 23-year "clock." § 99.810(3).

The definition of "Redevelopment Project Costs" was also amended. Prior to the amendments, those costs included "all reasonable or necessary costs incurred or estimated to be incurred, and any such costs incidental to a redevelopment plan ***and*** a redevelopment project …." § 99.805(11), RSMo (1986) (emphasis supplied). After the 1991 amendments, those costs included "any such costs incidental to a redevelopment plan ***or*** redevelopment project…." § 99.805(11) (emphasis supplied).

5. <u>The 1991 Amendments In Practice In Missouri</u>.

Thus, after the 1991 amendments, a municipality retained the ability to adopt tax increment financing for the Area, that is, for a single project identified in the Plan. As John Brancaglione (St. Peters' planning consultant on the Plan) testified, both types of TIF Redevelopment are utilized in Missouri under the Act. L. 419. Municipalities gained flexibility to implement redevelopment projects that—for whatever reason—did not "get off the ground" until years after the designation of blight. Municipalities also retained the ability to adopt tax increment financing for a single redevelopment area co-extensive with a comprehensive redevelopment project. St. Peters' Plan is the second type of TIF Redevelopment. John Brancaglione identified five TIF Redevelopments in the St. Louis County area, in addition to St. Peters' plan, all of which have a single Redevelopment Project whose area is coterminous with the Redevelopment Area designated. L. 419. He also identified TIF Redevelopments which contain specific Redevelopment Projects that are not coextensive with the Redevelopment Area. <u>Id.</u>

If the municipality elected to await adoption of tax increment financing until a specific redevelopment project was approved, then it would set forth "the legal

description of the area selected for the redevelopment project" when that project was adopted and capture increment from that discrete project area beginning at that time. If the municipality elected to adopt tax increment financing from the date of designation of blight (as St. Peters did), it would set forth the legal description of the redevelopment area as the "area selected for the redevelopment project" and tax increment financing would be captured from the redevelopment area at that time.

* * *

The General Assembly included the requirement of a legal description in § 99.805(10) for implementation of the 1991 amendments to the Act permitting (but not requiring) separate redevelopment "clocks" for discrete projects in the Area. Both before the 1991 amendments and after, the purpose is to require the legal description of the area for which tax increment financing is adopted in support of the Project. Including that legal description in Ordinance 1962 complies with the Act's language and purpose.

C. Plaintiffs' Interpretation Of The Legal Description Requirement Ignores The Plain Meaning Of The Act And Requires This Court To Disregard The Legislative Intent.

Plaintiffs concede that "the TIF Act [permits] having a redevelopment project that is coextensive with a redevelopment area." L. 1692.

The Trial Court correctly concluded that under the Plan and Ordinances "the area of St. Peters' 'Redevelopment Project' was selected in Ordinance No. 1962 (the ordinance describing the area from which tax increment financing was adopted). There is

no dispute that St. Peters collected tax increment only from within the area of its designated 'Redevelopment Project.'" L. 1694.

On this appeal, Plaintiffs assert "collection of PILOTS and EATS is not authorized until (1) St. Peters designates a project, § 99.845; (2) defines its scope by the use of a legal description that limits the project to real estate that will receive a substantial benefit from the use of PILOTS and EATS, § 99.820; and (3) uses the words 'redevelopment project' to identify the area from which it will collect EATS and PILOTS." App. 54.

The Act, however, nowhere requires the conditions as set out by Plaintiffs. As to the first, St. Peters designated its project area when it adopted tax increment financing for the Area in Ordinance 1962. As to the second, as fully explained in POINT I above, the record supports the Board's legislative determination that the "area selected for the redevelopment project" only includes the real property substantially benefited from the proposed redevelopment project improvements.

Finally, as to the third "requirement," the Act nowhere requires a municipality to "use the words 'redevelopment project' to identify the area" of tax increment allocation financing. St. Peters designated its single redevelopment project by setting forth the legal description of the area selected for the redevelopment project in Ordinance 1962. The legal description of the Area contained in Ordinance 1962 is the area from which EATS and PILOTS are collected.

At pages 56 through 58 of their Brief, Plaintiffs compare Ordinance 1962 with the Act, contending the comparison shows "the unlawful character of the ordinance." App.

56. The comparison shows nothing of the sort. The Ordinance used the word "Area" where Plaintiffs contend the Ordinance should have used "redevelopment project"; but the word "Area" is specifically defined in the Ordinance. L. 517. A review of the Ordinance shows it clearly describes the Area of St. Peters' sole "Redevelopment Project," namely, its Plan.

The final contention raised by Plaintiffs on this issue is that "[i]ronically, when St. Peters wanted to segregate PILOTS and EATS collected from the Costco project from PILOTS and EATS collected from the remainder of the [Area] to preserve its REC-PLEX funding, it passed additional ordinances that carefully defined the redevelopment project and the area selected for the redevelopment project." App. 62.

There is no "preservation" of "REC-PLEX funding." App. 62. The Costco Agreement specifically pledges special allocation fund revenues generated by the development to that development's financing. L. 631. EATS and PILOTS from within the Costco redevelopment that are not necessary to support the Costco obligations are specifically dedicated as "surplus" under the Act, and distributed to taxing districts. L. 631. Thus, increment otherwise available for other work in the Area is actually reduced, not, as Plaintiffs contend, "preserved." Moreover, Ordinance 1962, adopting tax increment financing, clearly refutes this contention. In Ordinance No. 1962 St. Peters directed that increment would first be applied to repayment of future revenue bonds (defined as "any bonds of the City payable solely out of …the special allocation fund"), next to project costs (defined as "any and all "redevelopment project costs" as defined in the Act"), and only then for payments of the City's general obligation bonds. L. 519,

520. Thus, the distribution of funds in the special allocation fund is specifically prioritized; repayment of St. Peters' general obligation bonds is third.

In the Costco redevelopment, St. Peters and Costco specifically limited the obligations of the special allocation fund pledged in support of the Costco development to the increment generated and collected from within the Costco development. Placing the risk of retirement of the Costco obligations solely on Costco hardly bespeaks "irony" or bad faith.

Finally, the terms of the Costco development demonstrate St. Peters' compliance with the Act. Prior to the Costco development, pursuant to Ordinance 1962, St. Peters collected EATS and PILOTS from the entire Area, including the area later sought to be developed by Costco. St. Peters adopted tax increment financing concurrently with the adoption of its Plan and designation of its Area (on December 29, 1992). L. 172, 180. St. Peters' Ordinance No. 1961 limits the term of any obligations issued in support of its Redevelopment Project to 20 years from the date of adoption of tax increment financing. L. 509. The pledge from the special allocation fund in support of the Costco development is specifically ***and correctly*** limited to the remainder of the term for which tax increment can be collected. That term ends on December 1, 2012. L. 629

What Plaintiffs term "ironic" is, in fact, consistent with the Act as implemented by St. Peters. Plaintiffs' assertion of "bad faith" is misleading and absolutely unsupported by the record.

D. Conclusion

For the reason that the undisputed material facts compel judgment as a matter of law against Plaintiffs on Counts I through III of their Petition, this Court should affirm the Trial Court's judgment against Plaintiffs.

III.

III. The Trial Court Properly Granted Summary Judgment In Favor Of St. Peters On Count IV Of The Petition Because St. Peters Properly Used PILOTS To Finance Construction of the REC-PLEX.

In Count IV of their Petition, Plaintiffs contend that § 99.805(7) prohibits the use of PILOTS for anything other than a "private use," and then assert that the use of PILOTS to finance the REC-PLEX is a public use. L. 20. Plaintiffs' contend that the "legislature expressly declared that PILOTS 'are to be used for a private use.'" App. 68. They contend that the "legislature expressly limited the use of PILOTS to private purposes because projects that are purely public, the REC-PLEX here, cannot support development through tax increment financing since they generate no taxes and no PILOTS." App. 69.

When interpreting a statute, this Court ascertains the intent of the legislature from the language used and gives effect to that intent, if possible. Butler v. Mitchell-Hugeback, Inc., 895 S.W.2d 15, 19 (Mo. banc 1995). Courts consider and give meaning to all of the terms used in a statute. Habjan v. Earnest, 2 S.W.3d 875, 882 (Mo. App. W.D. 1999). "The provisions of the entire legislative act must be considered together and all the provisions must be harmonized if possible." Hagan v. Director of Revenue, 968 S.W.2d 704, 706 (Mo. banc 1998). "It is fundamental that a section of a statute should not be read in isolation from the context of the whole act." State v. Haskins, 950 S.W.2d 613, 615 (Mo. App. S.D. 1997). In interpreting legislation, courts "must not be guided by

a single sentence . . . but [should] look to the provisions of the whole law, and its object and policy." Id.

The language of the Act reveals Plaintiffs' argument is flawed. The Act is replete with specific references to the application of increment for "public uses." Furthermore, the plain meaning of the word "private" read in conjunction with the Act contradicts Plaintiffs' assertion. The record supports the conclusion that PILOTS were properly applied by St. Peters in retiring general obligation bonds issued to finance the REC-PLEX. L. 1695-98.

Section 99.805(7) contains the definition of PILOTS:

As used in Sections 99.800 to 99.865, unless the context clearly requires otherwise, the following terms shall mean:

(7) "Payments in lieu of taxes," those estimated revenues from real property in a redevelopment project area acquired by a municipality, ***which revenues according to the redevelopment project or plan are to be used for a private use***, which taxing districts would have received had a municipality not adopted tax increment allocation financing, and which would result from levies made after the time of the adoption of tax increment allocation financing during the time the current equalized value of real property in the area selected for the redevelopment project exceeds the total initial equalized value of real property in such area until the designation is terminated pursuant to subsection 2 of section 99.850.

§ 99.805(7).

The term "private use" is nowhere defined in the Act. Words employed in a statute are given their usual and ordinary meaning unless the legislature itself has defined a particular term or phrase. Bartareau v. Executive Business Products, Inc., 846 S.W.2d 248, 249 (Mo. App. E. D. 1993).

The dictionary definition of "private" is stated as "intended for or restricted to the use of a particular person or group or class of persons," "not freely available to the public." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976), *"private,"* 1804-05.

This meaning of "private" when read in conjunction with the definition of PILOTS is consistent with this Court's recognition in Dunn that PILOTS are "special assessments." In Dunn, the Supreme Court distinguished PILOTS from taxes, holding that "taxes" are defined as "a pecuniary charge imposed by legislative or other public authority upon persons or property ***for public purposes:*** a forced contribution of wealth to meet the ***public*** needs of a government." Dunn 781 S.W.2d at 77 (emphasis supplied). The Dunn Court then found that PILOTS were not taxes—but rather "special assessments." "PILOTS are special assessments levied against the property in the District." Id. at 77.

The Dunn decision holding that PILOTS are akin to "special assessments" is consistent with the Act's definition of PILOTS because both follow from the understanding that PILOTS may be used "privately," as distinguished from taxes which can be used for the "public needs of a government."

Plaintiffs' interpretation of the definition of PILOTS—that they may not be applied to "purely" "public uses" (App. 67)—is inconsistent with the Act. Section 99.805(11), defining "Redevelopment project costs," includes "any . . . costs incidental to a redevelopment plan or redevelopment project [including] ***[c]osts of construction of public works or improvements***." § 99.805(11) (emphasis supplied). Section 99.820 provides a municipality may "[a]cquire and construct public facilities within a redevelopment area." § 99.820.1(9). Both of these references, by their plain language, support "purely" public uses of PILOTS. What could be a more "purely" public use than a "public work or improvement"?

Plaintiffs' interpretation of "private use" also stands in conflict with the history of the Act. Prior to the 1990 amendments, the only increment available to finance redevelopment were PILOTS—EATS were first approved in 1990. Prior to 1990, the definition of PILOTS and the limit of "redevelopment project costs" contained the same language relied on by Plaintiffs in this case.

In the pre-1990 context, therefore, the Plaintiffs' contention (based on precisely the same language they rely upon in this case) would be that PILOTS could not be used to finance or pay for "public works or projects" although those costs are specifically permitted "redevelopment project costs." § 99.805(11)(f), RSMo (1986). PILOTS—the only increment available prior to the 1990 amendments—would have been unavailable to finance such "purely" public projects because, under Plaintiffs theory, the Act limited their use to "private use." Under Plaintiffs' interpretation of the definition of PILOTS, Section 99.805(11)(f) is rendered meaningless until the 1990 amendments adopted

EATS, and only at that point some increment was available to be applied for those permitted redevelopment activities.

Recognizing the difficulties with their argument, Plaintiffs urge this Court to adopt the following meaning for "private use": a use which "enhance[s] the value of private property they improve in a manner sufficient to support a special assessment." App. 67.

Plaintiffs, however, give no reason or rationale supporting such a convoluted definition of "private use." They present no basis for this Court to abandon the plain meaning of the phrase, nor to abandon the application of Dunn's analysis which informs the proper understanding of "private use."

Moreover, Plaintiffs' proposed definition does not further their purpose—to have this Court declare illegal the use of PILOTS to finance the REC-PLEX. As discussed in detail in POINT I, the use of increment to fund construction of the REC-PLEX is not illegal under the Act.

Under their definition of "private use," the use of PILOTS is limited to uses which benefit the real property within a Redevelopment Project. The PILOTS in this case have been so used. Among other things, the assessed value of the property within the Area—a substantial private benefit to the property owners—has dramatically increased. St. Peters refers this Court to the discussion in POINT I above, in support of the substantial benefit provided by the Plan to the real property in the Area.

St. Peters' use of PILOTS to finance the REC-PLEX complies with the TIF Act because the Act specifically permits St. Peters to use PILOTS to retire general obligation bonds (§ 99.840.2), to construct public works (§ 99.805(11)(f)), and to construct public

facilities (§ 99.820.1(9)). In addition, the record clearly supports the Board's determination that the REC-PLEX and other Plan activities would substantially benefit private property within the Area. Accordingly, summary judgment against Plaintiffs on Count IV of the Petition was properly granted.

IV.

IV. The Trial Court Properly Granted Summary Judgment In Favor Of St. Peters On Count V Of The Petition Which Claimed That St. Peters Acted In Bad Faith or Acted Arbitrarily Or In Excess Of Its Authority In Adoption Of The Plan And Ordinances Because The Board's Legislative Determination That The Area Contains A Predominance Of Factors Of Blight Is Supported By An Overwhelming Factual Record.

In POINT IV, Plaintiffs assert the Trial Court erred in concluding, based on the undisputed facts, that the Board's findings contained in Ordinance No. 1961 (A) were not made in bad faith, and (B) were not arbitrary or in excess of its authority under the TIF Act. The undisputed facts relating to this Count are contained in Ordinance No. 1961 (Exhibit 1) and the Plan (Exhibit 2).

Plaintiffs raise two arguments under this POINT. First, Plaintiffs assert the determination of "blight" was in "bad faith" because St. Peters failed to spend increment "in reducing or eliminating the conditions of blight that formed the legal justification for the Area." App. 83. The undisputed facts unequivocally show TIF funds were expended only to "eradicate or eliminate" the conditions of blight existing in the Area. Plaintiffs' understanding of how the law is applied to the undisputed facts is misplaced. Plaintiffs basically disagree with the Board about <u>how</u> blight should be eradicated, but that decision is properly vested within the Board's legislative discretion.

Plaintiffs' second argument is equally untenable. Plaintiffs claim the Board's actions in designating the Area for redevelopment was "arbitrary" because, according to

Plaintiffs, the factors of blight identified do not "predominate." As the Trial Court found, however, the Board's determination that the factors of "blight" predominated in the Area at the time the Plan was adopted was supported by an overwhelming record, and far exceeded the "fairly debatable" standard applicable to the Board's legislative determination.

A. The Undisputed Facts Show No Bad Faith In The Board's Determination That Blight Existed In The Area.

It is undisputed that the Board acted in its legislative capacity in adopting the Plan and Ordinances. Therefore, judicial review of the Board's legislative decision is limited to a "determination of whether the action was arbitrary, the result of fraud, collusion, or bad faith, or whether the City exceeded its power." Maryland Plaza Redevelopment Corp. v. Greenberg, 594 S.W.2d 284, 287 (Mo. App. E.D. 1979) (citing cases).

The standard according to which the Board's findings are measured is whether "[f]rom the evidence before it, the Board of Aldermen ***could have reasonably determined the area to be blighted***." Id. at 288. "'unless it should appear that the conclusion of the City's legislative body in the respect in issue . . . is ***clearly*** arbitrary . . ., we cannot substitute our opinion for that of the City's. If the City's action . . . ***is reasonably doubtful or even fairly debatable*** we cannot substitute our opinion for that of the City Council.'" Allright, 538 S.W.2d at 324 (emphasis supplied) (quoting Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp., 518 S.W.2d 11, 16 (Mo. 1974)); JG St. Louis West Ltd. Liability Co. v. City of Des Peres, 41 S.W.3d 513, 517

(Mo. App. E.D. 2001) ("If [the] Board's decision is ***reasonably doubtful or fairly debatable***, we will not substitute our opinion for that of the Board.") (emphasis supplied).

Plaintiffs list 7 items they contend demonstrate the Board's alleged "bad faith." App. 83-85. The items recited do not demonstrate "bad faith."

In item (1), Plaintiffs assert that from "1993 until its last report filed with the State of Missouri, all of the TIF funds collected" were employed to finance the REC-PLEX. App. 83.

First, the contention is wrong. The undisputed facts show over $9 million in TIF funds have been committed to other activities under the Plan and over $1 million has been spent on other activities. L. 1248. TIF funds were applied to pay for over $1 million in street improvements. In addition, over $8 million in infrastructure improvements have so far been financed by TIF funds under the Costco development. Id. Thus, there are substantial, additional TIF revenues applied to activities other than the REC-PLEX.

Second, even if true, does not demonstrate "bad faith" at the time of adoption of the Ordinances and the Plan because the Act permits the use of increment to finance the Plan's program, only one component of which is the REC-PLEX. As discussed in the prior POINTS, the application of funds to finance the REC-PLEX is legal under the Act.

Third, the record clearly demonstrates that from inception of the Plan, St. Peters actively sought developers for the Plan's "power retail center," L. 1244-45, but did not reach agreement until the Costco proposal. The active solicitation for development in addition to the REC-PLEX defeats Plaintiffs' argument that the Board only intended to fund the REC-PLEX through its Plan.

Finally, the Plan contemplates a program 20 years in duration. L. 171. December 29, 2003 marked ***the eleventh year of the 20-year program***. The claim that the expenditure to date of revenues on one element of the many elements identified in the Plan somehow shows "bad faith"—when ***slightly more than half of the anticipated length of the program has run***—is ludicrous and misleading. This is precisely why the question of "bad faith" relating to the Board's finding is evaluated on the record before the Board at the time the Board made its decision. See Heman Const. Co. v. Wabash R. Co., 104 S.W. 67, 71 (Mo. 1907). Indeed, a Plan may be a complete failure, resulting in no development, no increase in property values and no increased economic activity. But that failure cannot mean the Board acted in "bad faith" or "dishonestly" when it adopted the Plan, because the Board's decision is based solely on the record before it at the time its legislative determination was made.

As to item (2), Plaintiffs assert that "St. Peters had already made arrangements with St. Charles County for the construction of the Spencer Road extension with non-TIF funds." According to Plaintiffs, this extension was "cited" as a "justification for a finding of blight" App. 83.

This statement is a gross misstatement of the undisputed facts. The Plan states the Spencer Road extension is "identified in the City's Capital improvements plan and [is] intended to be funded through sources of revenue other than" TIF revenues. L. 1248. The only reference to the extension in the Plan's analysis of blight factors is in a list of four roads "required in the [Area]." L. 539. As the Plan specifically states—after two full pages detailing "defective or inadequate street layout"—the facts provide "ample

evidence . . . that the street and roadway network in the [Area] is inadequate." L. 540. The lack of the Spencer Road extension is clearly supportable as a factor, among many, contributing to blight. That this one road will be built with funds other than TIF (a fact stated in the Plan) does not demonstrate "bad faith."

Item (3) is irrelevant and meaningless. Plaintiffs assert that "St. Peters did not adopt ordinances approving the [Area] until December, 1992," which is factually correct, but hardly bespeaks any bad faith.

In Item (4), Plaintiffs contention appears to be that the fact that St. Peters' City Hall was already in the Area somehow shows bad faith. A single building in the area of blight cannot alone defeat the finding of blight otherwise supported (as in this case) by an overwhelming record. See Tierney v. Planned Indust. Expansion Auth. of Kansas City, 742 S.W.2d 146, 151 (Mo. banc 1987) ("a blighted area may include parcels which are not themselves blighted"). City Hall's exclusion or inclusion from the Area is irrelevant to the blight determination and Plaintiffs' claim of "bad faith."

In Items (5) and (7), Plaintiffs assert no PILOTS or EATS were expended "for eradication of the blighting factors set out in the Redevelopment Plan." App. 84, 85. This is patently false. St. Peters spent all of the PILOTS and EATS in the special allocation fund on identified Plan Activities. The Act requires payment TIF revenues to "redevelopment project costs," defined as including "the sum total of all reasonable or necessary costs incurred or estimated to be incurred, and any such costs incidental to a redevelopment plan or redevelopment project." § 99.805(11).

The issue as framed by the Act is whether the TIF funds are applied as identified in the Plan, and the General Assembly wisely defined the Plan to be "the comprehensive program of a municipality for redevelopment ***intended*** by the payment of redevelopment costs ***to reduce or eliminate those conditions***, the existence of which qualified the redevelopment area as a blighted area . . . and to thereby enhance the tax bases of the taxing districts which extend into the redevelopment area." § 99.805(8). Thus, Plaintiffs' contention that blight still exists does not mean the Board acted in "bad faith."

Nothing in the Act requires St. Peters to eradicate conditions of blight according to the current political or personal imperatives of St. Charles County or its County Executive. Nothing in the Act requires a municipality to use increment directly to repair each factor of blight. Nothing in the Act requires the Plan contemplate use of increment to pay for herbicides or concrete to repair indicia of blight. St. Peters' Plan intended the "reduc[tion] or eliminat[ion]" of blight within the Area through the varied elements of its Plan. The Plan includes construction of the REC-PLEX, Costco's substantial retail center, and investment in road and infrastructure improvements to spur economic growth and development throughout the Area. The Plan is to eradicate blight through rejuvenation of the Area. The remediation of specific factors of blight naturally flows from that rejuvenation.

For item (6), Plaintiffs contend that the "J.C. Penney addition to the Mid Rivers Mall was already proposed at the time of the adoption of the" Plan. App. 85. This fact, even if true, does not show bad faith. The undisputed facts, moreover, were that J.C. Penney's did not build an addition to Mid-Rivers Mall until 1995; in 1992, J.C. Penney's

"was rumored to be closing the store in" a neighboring community (L. 406); and that in 1992, J.C. Penney's was under consideration as a tenant of the Mall but "was looking at two other locations, and that had been verified." L. 410. John Brancaglione testified to the existence of "all sorts of problems with respect to flooding on properties and onto [Interstate] I-70 in storm situations" in this area; those factors are the factors relied on by the Board in its finding of blight. L. 410.

In short, the factors relied on by Plaintiffs to demonstrate alleged "bad faith" are either flatly contradicted by the undisputed material facts or legally irrelevant to the issue of the propriety of the Board's finding. They show no bad faith either as individual factors, nor taken as a whole.

B. The Undisputed Facts Show No Arbitrariness In The Board's Determination That Blight Factors Predominated In The Area.

Plaintiffs also contend that the factors of blight existing in the Area did not "predominate" and therefore the Board's finding of blight was "arbitrary". App. 89. This, in spite of the fact that they use 7 pages of their Brief setting forth the stipulated findings of blight made by the Board.

The existence of a "blighted area" is determined by the municipality using the definition of "blighted area" contained in the Act, under which the legislative body determines whether the area suffers from a "predominance" of "blight" factors. § 99.805(1). "Predominate" is defined as synonymous with "predominant," defined as "having superior strength, influence or authority, prevailing." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1983), *"predominate" and "predominant,"* p. 927.

The standard for reviewing a claim of arbitrariness of a legislative decision is well-defined in Missouri. "If the City's action . . . ***is reasonably doubtful or even fairly debatable*** we cannot substitute our opinion for that of the City Council." Allright, 538 S.W.2d at 324 (emphasis supplied) (quoting Parking Systems, Inc., 518 S.W.2d at 16); JG St. Louis West Ltd. Liability Co. v. City of Des Peres, 41 S.W.3d 513, 517 (Mo. App. E.D. 2001) ("If [the] Board's decision is reasonably doubtful or fairly debatable, we will not substitute our opinion for that of [the] Board.").

There can be no dispute that the Board's determination that the Area suffered a predominance of the conditions of blight is at least "fairly debatable." In essence, Plaintiffs' argument is that they would have drawn a different conclusion. This is a legally insufficient basis to find "arbitrariness."

Plaintiffs' contend that the "indicia of blight identified by the Redevelopment Plan is substantially less than one-half the land," and then assert that "this Court has suggested that 'predominate' means more than half of the property is blighted," citing to Tierney v. Planned Indus. Expansion Authority of Kansas City, 742 S.W.2d 146 (Mo. banc 1987). App. 88. In Tierney, this Court upheld the legislative determination of blight on facts showing that ***greater than 50% of the buildings and structures in the "blighted" area were sound structures, and greater than 60% of the area blighted consisted of streets, alleys and surface parking.*** Id. at 151. In Tierney, the legislative conclusion on blight was upheld on a record showing ***greater than half the property was not blighted***. This Court stated there that "***[e]ven if we assume*** that an area may not be said to demonstrate a 'predominance' of blight unless more than half of the ground area is blighted . . . [t]he

legislative authority may properly find that [streets and parking surfaces] contribute to a condition of blight." Id. (emphasis added); see also State ex rel. U.S. Steel v. Koehr, 811 S.W.2d 385, 390 (Mo. banc 1991) (blight decision upheld on facts showing that the legislative body "made a survey of the property . . . and found about half of the area was vacant, the street plan was defective, and most of the property was in poor or fair condition."); State ex rel. Atkinson v. Planned Indus. Expansion Authority of St. Louis, 517 S.W.2d 36, 46 (Mo. banc 1975) ("Nor does the fact that land is vacant mean it cannot be considered 'blighted.' It may well be vacant because it no longer meets the economic and social needs of modern city life and progress.").

As this Court recognized in Tierney, no precise mathematical formula can be imposed to assess the legislative determination of the "predominance" of blight. Streets and parking lots may contribute to "blight" in one situation; the absence of streets and parking lots may contribute to "blight" in others. The General Assembly nowhere mandates that "predominance," as used in the Act, must equate with any minimum percentage of real property blighted. Certainly, the General Assembly could have. The General Assembly, however, wisely recognized that such a formulaic approach at the legislative level would be impractical and unusable. For example, how does one determine a percentage of the acreage in the Area has "unsafe conditions"? And what percentage of "unsafe conditions" supports the conclusion of "blight"?

As detailed in the Stipulation, there is overwhelming evidence of blight in the Area. App. 4-11. The Board's determination that the factors of blight predominate in the Area, as well as its designation of the Area, are well-supported legislative determinations.

On this record, this Court should affirm summary judgment against Plaintiffs on Count V of their Petition. For the foregoing reasons, this Court should affirm the Trial Court's grant of summary judgment against Plaintiffs on Count V of their Petition.

V.

V. The Trial Court Properly Granted Summary Judgment In Favor Of St. Peters On Count VI Of The Petition Because Obligations Issued To Support The Costco Development Do Not Violate Art. VI, § 27(b), Mo. Const.

In Count VI, Plaintiffs claim the "Costco financial obligations" violate Art. VI, § 27(b), Mo. Const., because they are not secured by revenues derived from "the lease or other disposal of the facility." App. 94.

St. Peters did not issue or sell bonds "for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any facility." Rather, as shown by the Costco Agreement and the relevant ordinances, St. Peters issued obligations to repay some of Costco's costs of redeveloping part of the Area. There are leasehold revenue bonds authorized by Art. VI, § 27(b) and there are TIF obligations authorized by § 99.835. St. Peters issued TIF obligations.

There are cases in which Section 27(b) can apply. The Act empowers a municipality to acquire real property and to convey the real property to private ownership obtained through the condemnation process in order to effectuate the redevelopment plan. See § 99.820.1(3), RSMo (2000). In the Dunn case, for instance, the local government body (the Tax Increment Financing Commission of Kansas City) obtained property through condemnation for the purpose of redeveloping it. 781 S.W.2d at 74. Section 27(b) was implicated because Kansas City used revenue bonds "to pay, *inter alia*, the ***costs of acquiring real estate*** for commercial and warehouse purposes." Id. at 80 (emphasis supplied). In this case, however, Section 27(b) does not apply because St.

Peters did not use revenue bonds to acquire property to convey to Costco. The facts that led this Court to find section 27(b) applicable in the Dunn case are absent here.

Furthermore, in the context of Section 27(b), the Dunn case holds that the constitution is not offended when additional funds generated directly by the use of redevelopment property (like PILOTS and EATS) are "pledged as security for the bonds issued by the municipality." 781 S.W.2d at 73. Thus, in this case, Section 27(b) would not be offended because St. Peters' obligations are funded solely by revenue generated by the redeveloped Costco property.

The statutory authority for TIF obligations (§ 99.835) is derived directly from the state constitution, which provides that laws (like the TIF Act) and ordinances (like those passed by St. Peters) "may be enacted for the clearance, re-planning, reconstruction, redevelopment and rehabilitation of blighted, substandard or unsanitary areas, and for recreational and other facilities incidental or appurtenant thereto, and for taking or permitting the taking, by eminent domain, of property for such purposes, and when so taken the fee simple title to the property shall vest in the owner, who may sell or otherwise dispose of the property subject to such restrictions as may be deemed in the public interest." Mo. Const., art. VI, § 21.

By their terms, the Act and Article VI, section 21, are applicable to this retail development for the alleviation of blight. Because no genuine dispute of material facts exists with respect to the facts underlying Count VI of the Petition, summary judgment as a matter of law on those facts must be affirmed against Plaintiffs and in favor of St. Peters and Costco on Count VI.

VI.

VI. The Trial Court Properly Granted Summary Judgment In Favor Of St. Peters On Count VIII Of The Petition Because The Use Of EATS Under The Plan And Ordinances Does Not Violate Art. VI, §§ 23 and 25.

In Count VIII of their Petition, Plaintiffs claim that St. Peters' use of EATS violates Art. VI, §§ 23 and 25, Mo.Const., which prohibit the General Assembly and political subdivisions of the state from granting public money to private individuals. Summary judgment was correctly entered against Plaintiffs on this claim.[10]

This Court has specifically held that the redevelopment undertaken pursuant to the Act is for a public purpose. Dunn, 781 S.W.2d at 78 ("Dunn claims that the use to which the land in the District will be put is not a public purpose. We disagree."). This Court noted that Article VI, § 21, specifically states the public purpose and grants the power to certain political subdivisions to "prevent, as well as eliminate, incipient conditions of blight." Id. Therefore, increment from the special allocation fund used in support of TIF redevelopment is for a public purpose.

[10] As discussed in the Substitute Respondent's Brief of Respondent Costco, Plaintiffs have not preserved any claim of facial invalidity of the EATS provisions of the TIF Act under Art. VI, §§ 23 and 25. See Costco's Substitute Respondent's Brief, pages 2-3 and 31-32.

Where incidental benefits flow to private individuals or corporations carrying out this public purpose, Article VI, §§ 23 and 25 are not violated. Dalton v. Land Clearance for Redevelopment Authority of Kansas City, 270 S.W.2d 44, 53 (Mo. banc 1954).

According to the Plaintiffs, EATS are taxes and it is their character as "taxes" which implicates §§ 23 and 25. App. 102. The Dunn Court however, disagreed. It recognized that taxes may be expended for public purposes: "Even if one assumes that PILOTS are tax revenues, art. X, § 3 requires that taxes collected be expended for public purposes; beyond that limitation, Article X, § 3 does not control the distribution or allocation to which tax receipts may be put." 781 S.W.2d at 75.

Furthermore, the General Assembly "has the constitutional authority to void sales taxes and to redistribute the revenue of a county sales tax." Berry v. State, 908 S.W.2d 682, 685 (Mo. banc 1995). Article X, section 1 of the Missouri Constitution declares, in pertinent part, that "[t]he taxing power may be exercised ... by counties and other political subdivisions only ***under power granted to them by the general assembly….***" Mo. Const., art. X, § 1 (emphasis added). "By the Constitution, the General Assembly decides the sales tax authority of local governments." Berry, 908 S.W.2d at 685.

"Art. VI, §23 does not apply to shifts in revenue among public bodies" because the public bodies' use of the revenues is for a public purpose. Berry, 908 S.W.2d at 685. In County of Jefferson v. Quiktrip Corp., this Court specifically recognized that the EATS provisions of the Act "authorize[] the redistribution of existing tax revenues from one local government to another." 912 S.W.2d 487, 491 (Mo. banc 1995). Consequently, the shift of tax revenue from St. Charles County to St. Peters is authorized by the General

Assembly pursuant to its specific constitutional powers. The use of EATS to reimburse redevelopment costs in return for redevelopment work being performed is not a grant of public money to private entities for a private purpose, but a use of taxes for public purposes as authorized by the General Assembly.

The Trial Court properly granted summary judgment in favor of St. Peters on Count VIII of the Petition because the use of EATS under the Plan and ordinances does not violate Art. VI, §§ 23 and 25, Mo. Const., and on this record this Court should affirm the Trial Court's judgment.

VII.

VII. The Trial Court Properly Granted Summary Judgment In Favor Of St. Peters On Plaintiffs' Claims Because Plaintiffs Did Not File Suit Within The Applicable Statute Of Limitations, § 516.120.

In POINT VII, Plaintiffs assert the Trial Court erred in granting summary judgment against them based on § 516.120, RSMo (2000), because they claim their suit was first brought within 5 years of the time the damages were sustained and capable of ascertainment and because the periodic demands for payment by St. Peters constitute a continuing wrong tolling the statute. App. 106.

Counts I through V of the Petition seek payment of money from St. Peters to the County in the form of a "refund [of] PILOTS and EATS paid by St. Charles County since the inception" of the Plan. All claims in the August 2000 Petition challenge the City's Ordinances that were adopted in December 1992.

The Trial Court properly found that Plaintiffs' claims for refunds accrued December 1992, on the date of adoption of the Ordinances. The Trial Court found the claims were barred under Section 516.120(1) or (2), RSMo (2000) (barring such claims after 5 years). [11]

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[11] Statutes of limitation apply against the Plaintiff Joe Ortwerth and also apply against the County and its Executive by virtue of Section 516.360, RSMo 2000, which provides that "[t]he limitations prescribed in sections 516.010 to 516.370 shall apply to actions brought in the name of this state, or for its benefit, in the same manner as to actions by private

Section 516.120(1) and (2) provide:

Within five years:

(1) All actions upon contracts, obligations, or liabilities, express or implied, except those mentioned in section 516.110, and except upon judgments or decrees of a court of record, and except where a different time is herein limited;

(2) An action upon a liability created by a statute other than a penalty or forfeiture.

Id.

Plaintiffs' claims, as the Trial Court and Eastern District Court of Appeals correctly determined, are based on "liabilities" or "obligations" resulting from adoption of Ordinances 1961 and 1962. According to each Count of the Petition, relief is requested based on the allegedly "illegal" actions of St. Peters on December 29, 1992. Ordinance 1962 (adopting tax increment financing) created the "liability" upon which Plaintiffs' suit is based. The Plaintiffs' claims all allege that the County has incurred "liabilities" and "obligations" because of the adoption of Ordinances 1961 and 1962. As recognized by the Eastern District Court of Appeals in this case:

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parties." § 516.360, RSMo 2000; County of St. Charles v. Powell, 22 Mo. 525 (Mo. 1856) (upholding limitations applied against county); Emery v. Holt County, 132 S.W.2d 970, 971 ((Mo. 1939) (County is subject to the statute of limitations); State v. Dalton, 182 S.W.2d 311, 312 (Mo. 1944) ("But neither can there be any doubt but that this common law concept ["nullum tempus occurrit regi," ("No time runs against the Crown")] is abolished.").

> The Missouri legislature has determined that a "cause of action shall … be deemed to accrue … when the damage resulting therefrom is sustained and is capable of ascertainment." § 516.100, RSMo (2000). Since its adoption in 1919, "[t]he word 'ascertain' [in Section 516.100] has always been read as referring to ***the fact of damage, rather than to the precise amount***." Dixon v. Shafton, 649 S.W.2d 435, 438 (Mo. banc 1983) (emphasis added). In Knipmeyer v. Spirtas, 750 S.W.2d 489, 490 (Mo. App. E.D. 1988), this Court held that if the ***damage*** is capable of ascertainment, the statute of limitations begins to run even if the ***amount*** of damage is not. (emphasis added) "[D]amage is sustained and capable of ascertainment once it is such that it can be discovered or made known." Zero Mfg. Co. v. Husch, 743 S.W.2d 439, 441 (Mo. App. E.D. 1987); see Rose v. City of Riverside, 827 S.W.2d 737, 738 (Mo. App. W.D. 1992).

RA A23-A24.

In State ex rel. Robb v. Poelker, 515 S.W.2d 577 (Mo. banc 1974), this Court held that an action by the City of St. Louis to recover a debt from various state officers was barred by the 5-year limitation period contained in § 516.120(2). The Court held that the statute bars all actions "upon liabilities created by statute." Id. at 583. In the Poelker case, the City of St. Louis sought recovery of monies owed by the state under the provisions of various statutes obligating the state to pay the City of St. Louis for the expense of caring for persons in "the insane and tuberculosis hospitals of the City of St. Louis." Id. at 580. The Supreme Court held the action was based on "liabilities created

by statute," and because the claim was brought more than 5 years from the incurrence of the liability, the action was time barred.

In Rose v. City of Riverside, plaintiff sued a city for damages in inverse condemnation. 827 S.W.2d 737 (Mo. App. W.D. 1992). The suit contended that the city's ordinance "constitute[d] an unconstitutional taking of [plaintiff's] property." Id. at 738. The Court in Rose recognized "the statute of limitations begins to run once the fact of damage is capable of ascertainment, even though the amount of damage is not yet ascertainable." Id. "[I]t was on passage of the . . . ordinance that damage was capable of ascertainment." Id. at 738.

Plaintiffs raise several arguments in an attempt to avoid the clear and plain application of § 516.120 to their claims.

First, Plaintiffs contend that the statute of limitations does not apply to them because the damages were not "capable of ascertainment" until PILOTS and EATS were actually paid to the special allocation fund and that the first payment was in 1995. App. 108. The record, however, shows that the first disbursement of PILOTS from the County was in July, 1995. L. 168. EATS increment accrued as early as December 31, 1993. L. 748; RL. 155, 156.

Further, "'[c]apable of ascertainment' refers to the fact of damage, rather than the precise amount." Lato v. Concord Homes, Inc., 659 S.W.2d 593, 595 (Mo. App. E.D. 1983). As recognized by the court in Lato, "[t]he fact that the extent of damage may be dependent upon uncertain future events has never been held to preclude the filing of suit nor to delay the accrual of the plaintiff's cause of action for purposes of the Statute of

Limitations." Id. "Missouri courts have uniformly held that the Statute of Limitations begins to run when the plaintiff's right to sue arises." Id.

In the present case, the argument that the "damages" are not capable of ascertainment until payment of increment is made, ignores the fact "right to sue" arose on the passage of the ordinance creating the obligation to pay increment. Plaintiffs' "damage" accrues because of an obligation arising under the Act as a result of the passage of Ordinance 1962. Plaintiffs could have brought a declaratory judgment action upon enactment of the Ordinances.

Plaintiffs' argument that the statute cannot begin to run until some funds are paid by St. Charles County is a red herring. By the adoption of TIF financing by ordinance, through operation of the Act, ***all*** PILOTS are payable and 50% of the increased economic activity taxes are payable. The injury is capable of ascertainment at that point, and the alleged damage is known.

In addition, the first disbursement of PILOTS from the County was in July 1995. L. 168. EATS increment accrued as early as December 31, 1993. L. 748. Thus, even if some payment of increment is required to begin the running of the limitations period, that first payment occurred well more than 5 years prior to the date Plaintiffs initially filed suit—August, 2000.

In a further argument, Plaintiffs assert they do not challenge the "creation" of the TIF District but only the "collection" of the increment. App. 35, 54. This new argument, arises in Plaintiffs' attempt to bring this case within the holding of City of Velda City v. Williams, 98 S.W.3d 880, (Mo. App. E.D. 2003). Under this theory, their claims would

be time-barred if they claimed Ordinances 1961 and 1962 were void, but because they (purportedly) narrowly cast their claims against St. Peters' authority only to "collect" increment, the damages are capable of ascertainment only when the collection occurs. The date "collection" occurs cannot be separated from the creation of the obligation and liability of the County for increment. If the Ordinances are valid, the capture of increment is valid. And, Plaintiffs assert in their Petition that St. Peters' Ordinances are "unlawful and void." L. 16. That is, Plaintiffs' Petition pleads the liability upon which suit is based—passage of the Ordinances designating the Area and adopting tax increment financing.

In addition, Plaintiffs misread Velda City. In Velda City, the city sued its former mayor to collect salary paid to her pursuant to an ordinance passed on her vote. 98 S.W.3d at 882. The mayor argued the action was barred by § 576.130, barring after three years actions against officers "upon liability by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty." Id. at 883. The Court in Velda City specifically held "the cause of action against [the mayor] is based not on the improper enactment of the ordinance, but rather on the illegal taking of the money by [the mayor]." Id. Manifestly, the suit in Velda City was against its officer, not against the City. Suit was brought against the officer within three years of the date the officer took the illegal salary.

In the present case, Plaintiffs have sued the city, not its officers. The suit in Velda City clearly fell within § 516.130, not § 516.120, because § 516.130 specifically applies

to actions against officers. Plaintiffs' "collection claim" is against St. Peters, not any official, and therefore § 516.130 does not apply. Section 513.120 applies.

For these reasons, the Trial Court correctly concluded the Plaintiffs' claims are barred by § 516.120, and this Court should affirm the Trial Court's summary judgment against Plaintiffs on all claims of their Petition.

VIII.

VIII. The Trial Court Properly Granted Summary Judgment In Favor Of St. Peters On All Claims Of The Petition Because Each Year's Demand By St. Peters For PILOTS And EATS Does Not Constitute A Continuing Wrong Tolling The 5-Year Statute Of Limitations.

Plaintiffs next contend the statute of limitations is tolled when more than one item of damage occurs, and that each years' allocation to the special allocation fund is a separate item of damage. App. 111-115.

Plaintiffs liken the increment payments to payment on a "promissory note;" (App. 111-12) or "payments of installments of premium on a surety bond." App. 112. PILOTS and EATS are neither of these. PILOTS and EATS are obligations or liabilities created by statute which arise on the date of adoption of tax increment financing. PILOTS and EATS represent the legislatively determined obligation for the payment of increment which results from redevelopment of an area from a blighted condition.

In addition, § 516.100, relied upon by Plaintiffs, specifically applies only where there is "more than one item of damage." § 516.100, RSMo (2000). Only one item of damage exists under TIF—the passage of the ordinance adopting tax increment financing. Thereafter, the allocation from the County occurs as a matter of law; the revenues of the affected taxing districts will not include the increased increment.

As Plaintiffs recognize, the statue of limitations begins to run when the "plaintiff could have first maintained the action to a successful result." Janssen v. Guaranty Land

Title Co., 571 S.W.2d 702, 705 (Mo. App. 1978). The statute "begins to run when the plaintiff's right to sue arises." Lato, 659 S.W.2d at 595; see App. 107.

Taxpayers and taxing districts can successfully maintain a declaratory judgment suit (such as that brought by Plaintiffs herein) upon enactment of the Ordinances at issue. Indeed, the Declaratory Judgment Act and this Court's Rules specifically provide an action may be maintained where the "rights, status or other legal relations [of any person] are affected by a …municipal ordinance …." § 527.020; see also MO.R.CIV.P. 87.02(a) (same).

The suit challenging the validity of the ordinances should have been brought upon the enactment of the ordinances. Thus, in Rodgers v. Thomas, 193 F. 952, 953 (8th Cir. 1911), an irrigation district was organized in 1895, and bonds were issued for the purpose of providing an irrigation system in 1896. In 1906, owners of land within the district brought an action claiming that, due to procedural irregularities in the issuance, the bonds were void. The Eighth Circuit held the claim barred by the statute of limitations: "For eight years the district and the taxpayers accepted the benefits of the contract for which these bonds were given in payment, and there is not a single allegation … tending to show that there were any impediments to an earlier prosecution of a suit to test the validity of the bonds. Id. at 957. As recognized by the Court in Canady v. Coeur d'Alene Lumber Co., 120 P. 830, 835 (Idaho 1911) (affirming the dismissal of a suit challenging the validity of ordinances),

although the ordinances may have been void, the action was barred because the plaintiff failed to exercise her rights within the limitations period.

Plaintiffs' arguments claiming a "continuing wrong" are equally misplaced. Under this argument, each payment of PILOTS and EATS by the County gives rise to a new cause of action because "[t]he injury to St. Charles County was made fresh each and every time . . . the County made payment." App. 114. The amount may differ year-to-year, but the "wrong" alleged by Plaintiffs remains the same: the obligation exists to allocate PILOTS and EATS to the special allocation fund.

For these reasons, the Trial Court correctly concluded the Plaintiffs' claims are barred by § 516.120, and this Court should affirm the Trial Court's summary judgment against Plaintiffs on all claims of their Petition.

IX.

IX. The Trial Court Correctly Granted Summary Judgment On All Claims Of Plaintiffs' Petition Based On Untimeliness.

A. St. Peters' Properly Pleaded Its Affirmative Defenses And Plaintiffs Waived Their Objection To Any Failure To Plead.

In its answer to the Petition, St. Peters specifically pled the affirmative defenses of "waiver, estoppel and laches." L. 49-50. Plaintiffs contend the pleading was deficient and therefore the Trial Court's consideration of these defenses was improper. App. 119.

Where, as here, Plaintiffs failed to raise the "issue with the trial court by filing a motion for a more definite statement pursuant to Rule 55.27(d)," Plaintiffs are "deemed to have waived any complaint as to the insufficiency of the . . . pleadings to assert the affirmative defense…." Mobley v. Baker, 72 S.W.3d 251, 259 (Mo. App. W.D. 2002). In addition, St. Peters' allegations relating to the affirmative defenses of waiver, estoppel and laches contain sufficient facts to support the affirmative defenses pleaded. L. 49-50.

This Court has held that it will not "charge a trial court with error in ***allowing an affirmative defense to be raised for the first time in a motion for summary judgment***." Green v. City of St. Louis, 870 S.W.2d 794, 797 (Mo. banc 1994) (emphasis added). The affirmative defenses were raised by St. Peters in its Motion for Summary Judgment, filed on June 17, 2002. L.5. Plaintiffs failed to file a timely response. L. 7; RL. 178.

This Court should reject Plaintiffs' attempt at this late stage to strike the affirmative defenses because the defenses were properly pleaded in St. Peters' Answer and were raised in conjunction with St. Peters' Motion for Summary Judgment.

B. Laches

Plaintiffs assert (1) that laches is not available against officers of a political subdivision such as the County Executive in this case; or (2) that St. Peters' has not met its burden to prove laches.

Laches is "the neglect for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done." Metropolitan St. Louis Sewer Dist. v. Zykan, 495 S.W.2d 643, 656 (Mo. 1973). Laches applies where "a party with knowledge of the facts giving rise to his rights delays assertion of them for an excessive time and the other party suffers legal detriment therefrom." Rich v. Class, 643 S.W.2d 872, 876-877 (Mo. App. E.D. 1982). "For laches to apply, the delay must be unreasonable and unexplained and the other party must be materially prejudiced." Jennings v. Director of Revenue, 9 S.W.3d 699, 700 (Mo. App. S.D. 1999).

While "[t]here is no fixed period within which a right or claim must be asserted in order that it avoid being barred by laches; temporal limits are drawn in light of the circumstances of the particular case." Kimble v. Worth County R-III Bd. of Educ., 669 S.W.2d 949, 954 (Mo. App. W.D. 1984).

In Missouri, the doctrine of laches may be applied against individuals and Counties: "it is no longer a disputed question that the doctrine of laches applies to a county or other municipal corporation as well as to individuals." Simpson v. Stoddard County, 73 S.W. 700, 710 (Mo. 1903).

In Dunklin County v. Chouteau, the doctrine of laches was applied to bar the county's suit "to set aside a patent professing to convey 100,000 acres of swamp lands to the Cairo & Fulton Railroad Company, to vacate two orders of the district county court upon which the patent [was] based, and to vacate three compromise deeds from the county to the defendant." 25 S.W. 553 (Mo 1894). The Court in Dunklin held laches barred the county's claims because "the county remained silent for 30 years, assessed and collected taxes on the land, and made compromise deeds." Simpson, 73 S.W. at 711. The Dunklin Court stated:

> No excuse whatever is offered for the long delay and inaction on the part of the plaintiff. The neglect of the county in asserting its rights in a proper way for so great a length of time, to the continual prejudice of the rights of the defendant, cannot be excused. Courts of equity cannot, and ought not, to give relief in such a case. The delay and conduct of the county is a complete bar to the relief which it now asks….

Dunklin, 25 S.W. at 557.

Subsequently, in State ex rel. Eagleton v. Champ, 393 S.W.2d 516 (Mo. banc 1965), the Court held that the Attorney General, after the passage of a period of three years and nine months, was barred by laches from challenging the incorporation of a village. And in Cherry v. City of Hayti Heights, 563 S.W.2d 72 (Mo. banc 1978), this Court held that when a suit was filed two years after incorporation of the city, the doctrine of laches applied to preclude a plaintiff from challenging the incorporation of the city and resulting taxes.

As recognized by Judge Wolff, in his Concurring Opinion in Green v. Lebanon R-III School District, 13 S.W.3d 278, 287 (Mo. 2000), "[i]t is well to interpret and enforce the requirements of the constitution, but it is quite another matter to disrupt settled expectations years after a constitutional violation has purportedly occurred." In this case, the delay by Plaintiffs in challenging the actions of St. Peters will disrupt settled expectations after years of reliance on those expectations. No justification exists for Plaintiffs' delay.

Plaintiffs do not seriously contest the applicability of laches or estoppel against them but rely instead on the assertion that "St. Peters does not claim or show any prejudice as a result of the Plaintiffs' delay. App. 122.

In Dunklin, the Court recognized prejudice where, during the delay, "vast sums of money were being invested in these lands…." Dunklin, 25 S.W. at 557; Champ, 393 S.W.2d at 529 (prejudice exists as "very considerable amounts of time, effort and money" were expended during the delay).

St. Peters met its burden of proof on the issue of laches. Plaintiffs raised no objection to the Redevelopment until August 9, 2000, ***8 years after adoption of the ordinances they claim are invalid.***

During the delay, St. Peters incurred substantial financial liability—over $23 million in obligations are currently supported by the special allocation fund. The prejudice to St. Peters is obvious as during the period of delay $23 million in obligations have been pledged from future anticipated revenues; over $6 million has been expended in support of redevelopment; and much time and effort in support of the Plan has been

invested. To borrow from the Court's holding in Dunklin, Plaintiffs have offered "[n]o excuse whatever . . . for the long delay and inaction on the part of the plaintiff." 25 S.W. at 557.

For these reasons, the Trial Court correctly concluded Plaintiffs claims for refunds are barred by laches.

C. Estoppel and Waiver

The County's receipt of benefits under the Plan precludes under estoppel its right to challenge the Plan and ordinances. "A party asserting estoppel must prove all required elements of estoppel in order to prevail. These elements are (1) a statement or act by the government entity inconsistent with the subsequent government act; (2) the citizen relied on the act; and (3) injury to the citizen. In addition, the governmental conduct complained of must amount to affirmative misconduct." Twelve Oaks Motor Inn, Inc. v. Strahan, 110 S.W.3d 404, 408 (Mo.App. S.D. 2003).

In the present case, the County knew of the proposed TIF Plan, including the intended use of increment to retire REC-PLEX financing obligations—there is nothing in the record indicating the County failed to receive notice of the public hearings regarding the Plan's adoption. In addition to its silent acquiescence, it affirmatively supported the Plan through its grant of $25,000 in support of the REC-PLEX. RL. 231. Then, each year since the Plan's adoption, the County has accepted into its coffers the benefits of the redevelopment efforts (50% of the increased EATS, construction of infrastructure and establishment of businesses). Its conduct in accepting the benefit in each of the years 1993 through 2000 reasonably conveyed to St. Peter's that its Redevelopment effort was

supported (or at least not opposed) by the County. See St. Louis Public Service Co. v. City of St. Louis, 302 S.W.2d 875, 879 (Mo. banc 1957) ("The rule is well-settled that one voluntarily proceeding under a statute or ordinance, and claiming benefits thereby conferred, will not be heard to question its validity in order to avoid its burdens."). St. Peters continued to implement its Plan in light of the County's silent acceptance and affirmative support of the benefits.

Plaintiffs waited before filing suit until they received substantial benefits from the Redevelopment efforts, including the construction of substantial infrastructure improvements, twenty-fold increases in the assessed values of real property in the Area and ten-fold increases in the sales tax revenues resulting from the County's sales tax levies.

Plaintiffs contend the County never accepted the benefits of the redevelopment—that the County "did not voluntarily accept increases in sales tax revenue from St. Peters." App. 129. But this contention misunderstands the very nature of TIF Redevelopment. The Act, like other redevelopment laws, was "[p]rompted by the need to eliminate" blight by vesting "municipalities with power to eradicate those conditions and redevelop those areas." Annbar Associates v. West Side Redevelopment Corp., 397 S.W.2d 639, 635 (Mo. banc 1966). In the case at hand, the Act operates under the General Assembly's conclusion that in a blighted area, but for redevelopment, the blight would persist with the consequent effect that the tax base would remain stagnant. The Act only allocates those "payments in lieu of taxes ***attributable to the increase in the … assessed valuation***," i.e., PILOTS, to support the of the redevelopment. EATS, similarly,

consist of only a portion of the ***increased revenues*** generated in the area. This is a suit for damages. In fact, Plaintiffs have no damages because without the Plan, the revenues they claim to have lost would not have existed. The mechanism of TIF is to pledge the revenues otherwise never generated to support the redevelopment.

St. Charles County, its County Executive and Joe Ortwerth, individually, have affirmatively accepted the benefits of the redevelopment work for years. The rejuvenation of the Area from one of blight—with the consequent depressed tax base—to one of economic vitality—with the consequent present and future benefit to the County's treasury—is a benefit to the County. As to increased revenues from economic activities, St. Charles County's receipts have, as a matter of fact, increased as a result of the redevelopment undertaken by St. Peters—the Act only allocates 50% of the increased economic activity tax revenues resulting from County levies to the redevelopment with the effect that the other 50% goes to St. Charles County. In 2001 alone, the County's 1% sale tax levy generated $923,783.68 in revenue from the Area. In 1991, the County received only $47,604.54 in revenue from that same rate. Because of the redevelopment efforts of St. Peters, the County's sales tax revenues from the Area have increased over 13-fold.

Plaintiffs have accepted the benefits of the Redevelopment, taken affirmative actions in support of the Redevelopment, and have unreasonably delayed in instituting suit seeking to "undo" the Redevelopment. Their long, inexcusable delay and silent acceptance of St. Peters' work must, in fairness, bar their claims here. Accordingly, the Trial Court's summary judgment should be affirmed.

X.

X. Plaintiffs' Claims For Refunds Or Recovery Of The PILOTS And EATS Are In Any Event Barred Because Of the Doctrine Of Sovereign Immunity And The Absence Of A Statutory Procedure Authorizing Such Recovery.

Plaintiffs seek the payment of money from St. Peters to St. Charles County in the form of a refund or recovery of PILOTS and EATS paid by St. Charles County. There is no statutory procedure which provides for any right of refund or recovery of such monies once they were paid to St. Peters. There is also no contractual provision for the recovery of such monies.

The law in Missouri is clear that when monies in the nature of taxes are paid to a governmental body, even if the law under which they were paid is unconstitutional, there can be no recovery of those monies absent a specific statutory refund or procedure allowing such recovery. Community Federal Savings & Loan Association v. Director of Revenue, 752 S.W.2d 794, 797 (Mo. banc 1988). This arises by reason of the doctrine of sovereign immunity. Id. at 796-97. Community Federal has been applied to the recovery of taxes imposed by local governmental body. See Lett v. City of St. Louis, 948 S.W.2d 614, 620 (Mo. App. E.D. 1996).

An exception to the Community Federal rule exists through procedures for the payment of taxes under protest (see, e.g., § 139.031, RSMo (2000)) and the recovery of those taxes in a subsequent lawsuit. But that procedure has application only when a taxpayer is seeking a tax refund, which is not the situation here. Rather, Plaintiffs seek to

require the moneys involved be refunded to St. Charles County. There is no existing statutory procedure for such repayment or refund to St. Charles County, even if, *arguendo*, Plaintiffs' claims of unlawfulness would be sustained.

Consequently, Plaintiffs' claims that St. Charles County is entitled to any recovery of moneys from St. Peters are without merit. Accordingly, summary judgment against the Plaintiffs on their Petition should be affirmed by this Court.

CROSS-APPEAL POINT RELIED ON

XI

XI. The Trial Court Erred In Refusing To Assess The Attorneys' Fees Incurred By St. Peters And Costco In This Action Against The Plaintiffs In That The Declaratory Judgment Act Permits Attorneys' Fees To Be Recovered In Cases of Special Circumstances, And The Trial Court Abused Its Discretion In Failing To Find Special Circumstances Exist In This Case.

Standard of Review

"Awards of attorney's fees are left to the broad discretion of the trial court and will not be overruled except for an abuse of discretion." Union Center Redevelopment Corp. v. Leslie, 733 S.W.2d 6, 9 (Mo. App. E.D. 1987); Feinberg v. Adolph K. Feinberg Hotel Trust, 922 S.W.2d 21, 26 (Mo. App. E.D. 1996) ("In an equity case…the award of attorney's fees is left to the broad discretion of the trial court.").

Argument on CROSS-APPEAL POINT XI.

Supreme Court Rule 87.09 provides that "[i]n any proceeding under Rule 87, the Court may make such award of costs as may be equitable and just." Mo.R.Civ.P. 87.09; § 527.100, RSMo (2000) (Declaratory Judgment Act – statutory counterpart to Rule 87.09).

In general, Missouri follows the "American Rule," that is, "with few exceptions, absent statutory authorization or contractual agreement, each litigant must bear the expense of its own attorney's fee." DCW Enterprises, Inc. v. Terre du Lac Ass'n, Inc., 953 S.W.2d 127, 132 (Mo. App. E.D. 1997) (citing cases).

However, "[t]he word 'costs' appearing in Rule 87.09 has been interpreted in several declaratory judgment cases ***presenting special circumstances*** to include attorney fees." Temple Stephens Co. v. Westenhaver, 776 S.W.2d 438, 442 (Mo. App. W.D. 1989) (emphasis supplied); see also DCW Enterprises, 953 S.W.2d at 132 (discussing cases involving "special circumstances" or "unusual circumstances").

In addition, "[o]ne exception to the [American] rule . . . permits litigants to be 'reimburse[d] ***when ordered by a court of equity [in order] to balance benefits***.'" Feinberg, 922 S.W.2d at 26 (emphasis supplied).

The City is entitled to an award of its attorneys' fees and costs incurred in the prior lawsuit under both Rule 87.09 and pursuant to this Court's equitable powers to balance the benefits.

In Temple Stephens, the defendant failed to identify the plaintiff, Temple Stephens Company, as an adjacent landowner entitled to notice from the City of Columbia, Missouri, in conjunction with defendant's re-zoning application. 776 S.W.2d at 441. In conjunction with the declaratory judgment entered in favor of the plaintiff voiding the re-zoning, the trial court awarded the plaintiff its attorneys fees as costs under Rule 87.09. Id. at 439. The appellate court affirmed the attorneys' fees award based on the existence of "special circumstances" including the facts that the "invalidity of the ordinance rezoning the property affected the property owners contiguous to the subject property and the city government," and that "[t]he resulting opinion further clarifies the notice obligations contained in the City's zoning ordinances to the benefit of owners and prospective owners of property within the City." Id. at 443. The Temple Stephens court,

in addition, considered the facts that the intentional conduct of the plaintiff caused a deprivation of Temple Stephens' right to notice, with the result that Temple Stephens incurred attorneys' fees that it otherwise would not have incurred. Id.

In Bernheimer v. First Nat. Bank of Kansas City, 225 S.W.2d 745, 754-55 (Mo. banc 1950), the Supreme Court of Missouri reversed the trial court's decision failing to award plaintiff attorneys' fees in a declaratory judgment suit interpreting the terms of a trust which benefited, in part, the plaintiff. The Supreme Court held that the questions raised in the suit were "important to the testamentary trustees in ascertaining the meaning of the will, and in charting a course for the administration of the trust estate." Id. at 755. The Court held that these circumstances warranted an award to plaintiff of his attorneys' fees. Id. at 752-55.

The defense of the underlying lawsuits has benefited Missouri.[12] The present lawsuit broadly attacked the Act as applied throughout the State of Missouri in numerous TIF Redevelopment Plans implemented in numerous Missouri municipalities. The lawsuit attacks the Act and therefore challenges the settled expectations of municipalities throughout the State operating redevelopment plans under the Act. The Trial Court's Judgment against Plaintiffs on all counts of the Petition clarifies the Act for the benefit of all municipalities with pending Plans. The adverse economic impact of a contrary decision is unknown but potentially affects redevelopment plans all over the State, the

[12] St. Charles County initially filed suit in August, 2000, and, after its voluntary dismissal without prejudice of that action, the Plaintiffs brought the present lawsuit.

municipalities sponsoring those plans and the obligations issued in support of that redevelopment work. St. Peters alone bears the attorneys' fees for defending the Act.

The defense of the suits has also benefited citizens of the County. According to the Plaintiffs, the lawsuit represented a "potentially financially devastating lawsuit" for St. Peters. The impact of financial devastation of a municipality within the County are, thankfully, unknown. However, the benefit of avoiding such devastation clearly accrues to all citizens of the County.

In addition, the record includes indicia of bad faith. In 1993, St. Charles County contributed $25,000 in support of development of the REC-PLEX. RL. 231-34. Years later, the County attacks the City's ordinances under which the REC-PLEX serves as the center-piece of the City's redevelopment. The current suit, moreover, is motivated by a political disagreement with St. Peters and with the General Assembly. In June, 1999, the County, through its County Executive Joe Ortwerth, publicly denounced the Act and St. Peters' utilization of the Act in its redevelopment of blighted areas. The County Executive stated that the County "is compelled under the questionable legal burden of state statute" to comply with the Act's provisions, and asserted that the "Missouri Supreme Court has deceitfully interpreted the TIF statute." RL. 112. Newspaper articles quote the County Executive as charging that "the (state) legislature is fully in the grips of the development community and of the City officials" and that "it has become clear to me that we are not going to succeed at trying to amend the TIF Statute through the legislative process. The only way this issue is going to be remedied is through the legal process." RL. 114-15.

The very claims for "refunds" of the increment generated as a result of redevelopment in the Area also demonstrates bad faith. The refund demands are not necessary to resolve Plaintiffs' disputes with the legislative decisions of the General Assembly and St. Peters. The current suit is, after all, a declaratory judgment action. Plaintiffs, however, knowing the potential that "refunds" may financially devastate St. Peters—a municipality within St. Charles County—nonetheless demands refunds be repaid by the special allocation fund.

The special allocation fund represents a fund which was preserved to the benefit of all citizens of the County—because a judgment ordering refunds may be "financially devastating" to St. Peters, one of the County's municipalities. St. Peters' defense of the lawsuits has preserved that fund for the benefit of the Area, the citizens of St. Peters and the citizens of the County. An attorneys' fees award to St. Peters balances the benefits among the citizens of the County resulting from the preservation of that fund.

CONCLUSION

The Trial Court correctly entered summary judgment against Plaintiffs on all claims of their Petition. That judgment should be affirmed here.

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IN THE SUPREME COURT OF MISSOURI

ST. CHARLES COUNTY, et al.,	)	
	)	
Appellants,	)	
	)	
vs.	)	**No. SC 86302**
	)	
CITY OF ST. PETERS, et al.,	)	
	)	
Respondents.	)	

Appeal from the Eleventh Judicial Circuit Court
Honorable Lucy D. Rauch, Circuit Judge
Division No. 3

CERTIFICATE OF ATTORNEY FOR BRIEF AND DISK SUBMITTED

The undersigned hereby certifies that the Substitute Brief for Respondent/Cross-Appellant, the City of St. Peters, Missouri, complies with the limitations contained in Rule 84.06(b) and that there are 24,199 words in the brief, excluding the cover, certificate of service, signature block and appendix. A floppy disk containing a copy of the Substitute Brief of Respondent/Cross-Appellant, the City of St. Peters, Missouri is attached and I hereby certify that said floppy disk has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

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